No. 91-7094-CFH
Status: GRANTED
CAPITAL CASE

Docketed:
January 15, 1992

Title: Willie Lee Richmond, Petitioner
v.
Samuel A. Lewis, Director, Arizona Department of Corrections, et al.

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Ford,Timothy

Counsel for respondent: McMurdie,Paul J.

Entry	Date	Note	Proceedings and Orders
1	Jan 15 1992	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Feb 18 1992		Brief of respondent Sameuel Lewis in opposition filed.
4	Feb 27 1992		DISTRIBUTED. March 20, 1992
5	Mar 12 1992	X	Reply brief of petitioner Willie Lee Richmond filed.
7	Mar 18 1992		Supplemental brief of respondent Sameuel Lewis filed.
8	Mar 23 1992		REDISTRIBUTED. March 27, 1992
10	Mar 30 1992		Petition GRANTED.
			**********
12	May 14 1992		Order extending time to file brief of petitioner on the merits until May 27, 1992.
14	May 27 1992		Brief of petitioner Willie Lee Richmond filed.
13	May 29 1992		Joint appendix filed.
15	Jun 29 1992		Brief of respondent Samuel Lewis filed.
16	Jul 14 1992		CIRCULATED.
17	Jul 21 1992		SET FOR ARGUMENT TUESDAY, OCTOBER 13, 1992. (3RD CASE).
18	Jul 22 1992	D	Application (A92-52) extension of time to file reply brief (on the merits), submitted to Justice O'Connor.
19	Jul 24 1992		Application (A92-52) denied by Justice O'Connor.
21	Aug 3 1992	X	Reply brief of petitioner filed.
22	Sep 28 1992		Record filed.
		*	Partial proceedings and briefs United States Court of Appeals for the Ninth Circuit.
23	Oct 1 1992		Record filed.
		*	Original proceedings United States District Court for the District of Arizona (1 box)
24	Oct. 13 1992		ARGUED.

ORIGINAL 91-7094

No. 91-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

WILLIE LEE RICHMOND,

Petitioner,

v.

SAMUEL A. LEWIS, Director,
Arizona Department of Corrections; and
ROGER CRIST, Superintendent of the
Arizona State Prison,

Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner Willie Lee Richmond, through his undersigned counsel, hereby moves this Court for leave to proceed on his Petition for Certiorari in forma pauperis, without prepayment of costs and fees. Petitioner has been indigent and proceeded in forma pauperis at all stages of the state and federal proceedings in this case. Counsel was appointed to represent him in both courts below under the Criminal Justice Act, and 21 U.S.C. § 848(9).

DATED this 15 day of January, 1992.

Respectfully submitted,

Timothy K. Ford
Attorney for Petitioner

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No. 91-_____

IN THE SUPREME COURT OF THE UNITED STATES

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WILLIE LEE RICHMOND,

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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91-7094

QUESTIONS PRESENTED

1. Whether petitioner's death sentence contravenes the Eighth and Fourteenth Amendments because it was upheld by the Arizona Supreme Court on the basis of an application of Arizona's "especially heinous, atrocious or cruel" aggravating circumstance which either extends the circumstance to a set of facts that no rational factfinder could conclude fall within it or arbitrarily assumes a set of facts that no actual factfinder has ever found in this case.

2. Whether a federal habeas corpus court may apply a rule of "automatic affirmance" to a death sentence which was based on both constitutional and unconstitutional aggravating circumstances, when the law of the state that imposed the sentence requires the sentencer to weigh these aggravating circumstances against the mitigating circumstances in determining the penalty.

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IN THE SUPREME COURT OF THE UNITED STATES

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Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner Willie Lee Richmond prays that the Court will grant certiorari to review the decision of the majority of the panel of the United States Court of Appeals for the Ninth Circuit issued December 26, 1990, rehearing denied October 17, 1991, affirming the dismissal of a habeas corpus petition which challenged his conviction of murder and sentence of death.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet officially reported; a copy of the opinion, as amended on December 18, 1991, is attached as Appendix A. A copy of the Court of Appeals' order denying rehearing and rehearing en banc, with four judges dissenting, is attached as Appendix B.

The opinion of the Supreme Court of Arizona affirming the Petitioner's death sentence is reported at 666 P.2d 57, and is attached as Appendix C. A copy of the trial court's sentencing decision, which is unreported, is attached as Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was issued December 26, 1990; a timely Petition for Rehearing was denied on October 17, 1991. This Petition is being filed within 90 days of that date. Rule 13.1.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case also involves the Fourteenth Amendment to the Constitution of the United States, which provides in part:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the following provisions of the law of the State of Arizona:

Arizona Revised Statutes § 13-703E, which provides:

> In determining whether to impose a sentence of death or life imprisonment without possibility of release on any basis until the defendant has served twenty-five calendar years if the victim was fifteen or more years of age or thirty-five calendar years if the victim was under fifteen years of age, the court shall take into account the aggravating and mitigating circumstances included in subsections F and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

Arizona Revised Statutes § 13-703F, which provides in part:

> Aggravating circumstances to be considered shall be the following:
>
> * * *
>
> 6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

STATEMENT OF THE CASE

Petitioner Willie Lee Richmond is under a death sentence imposed upon by an Arizona judge, upon a general jury verdict finding him guilty of the murder of Bernard Crummett during a robbery in August, 1973. Although there was conflicting evidence as to who caused the victim's death, the other perpetrator of the crime, a white woman named Rebecca Corella, was not prosecuted.

Mr. Richmond's death sentence was vacated in 1978, as a result of a determination that the Arizona sentencing statute was unconstitutional under Lockett v. Ohio, 438 U.S. 586 (1978). At resentencing, despite substantial mitigating evidence, the same trial judge again sentenced Mr. Richmond to death. In a divided opinion, the Supreme Court of Arizona affirmed. State v. Richmond, 136 Ariz. 312, 666 P.2d 57, cert. denied, 464 U.S. 986 (1983); Appendix C.

After exhausting state remedies, Mr. Richmond filed a petition for a writ of habeas corpus in the United States District Court for the District of Arizona. The petition was summarily dismissed, on different grounds, three times. Different panels of the Court of Appeals reversed the first two orders of dismissal, and remanded. Richmond v. Ricketts, 730 F.2d 1318 (9th Cir. 1984), Richmond v. Ricketts, 774 F.2d 957 (9th Cir. 1985). A third panel affirmed the third summary dismissal in the decision below. Appendix A. A timely petition for rehearing and suggestion for rehearing en banc was denied, with four judges dissenting. Appendix B.

1. The Offense and the Trial.

The decision of the panel below summarized the facts of the crime and the state prosecution as follows:

> On an August evening seventeen years ago, the victim [Bernard Crummett] met Rebecca Corella, a nude dancer, at the Bird Cage Bar in Tucson, Arizona. After leaving the bar, the pair met Richmond in the bar's parking lot where Corella attempted to persuade Richmond to allow his fifteen-year-old girlfriend, Faith Erwin, to prostitute herself with Crummett. Richmond and Erwin refused, and after a brief conversation, Corella agreed to have sex

> with Crummett herself. Crummett thereupon produced a twenty-dollar bill, which Corella handed to Richmond and which Richmond palmed and surreptitiously exchanged for a ten. A brief argument ensued as Richmond and Corella insisted that Crummett had only given them ten dollars.
>
> Crummett eventually yielded and agreed to pay more. As he reached into his wallet a second time, Corella observed what seemed a considerable amount of cash, and she communicated her observation to Richmond. All four individuals then proceeded in a borrowed station wagon to Corella's motel-room apartment. There, just as Corella and Crummett emerged from the bedroom, Richmond whispered to Erwin his intention that they rob Crummett, explaining that they should not commit the crime in the apartment because Crummett might remember the surroundings.
>
> The group then left the motel and with Richmond as their driver proceeded to the end of a road on the outskirts of Tucson. Richmond thereupon stopped the car, and either Richmond or Corella - the testimony conflicts - told Crummett to get out because the car had suffered a flat tire. Richmond then assaulted Crummett, beating him with his fists and knocking Crummett to the ground. As Crummett lay motionless, Richmond pelted him with rocks. Corella, meanwhile, grabbed Crummett's wallet. According to Erwin, who admitted that she was vomiting and "coming down" from heroin during the incident, the following events then transpired:
>
> Q. [Mr. Howard, Prosecutor] Then what happened?
> A. [Erwin] Well, they all got in the car, and Becky [Corella] was getting the wallet and what else, you know. I looked over to see what else was taken. And Becky [Corella] was getting the wallet and we came in the car and left.
> Q. And where did you go from there?
> A. Back to the Sands Motel.
> Q. Did you run over anything?
> A. Yes, a man. It was a bump, after we were leaving.
> Q. After you felt that bump, was anything said in the car when you felt that bump?
> A. Becky [Corella] said, it felt like a man's body.
> Q. Who was driving the car?
> A. Willy [sic].
>
> Under cross-examination, Erwin stood by her contention that Richmond had been the driver at the time the car ran over Crummett. She admitted, however, that she was suffering greatly under the influence of her drug

injections at the time and that she was lying back on the car seat with her eyes closed.

The police found Crummett's body at five o'clock the following morning. The examining pathologist testified at trial that the body exhibited signs of three forms of extreme force. First, there were wounds and indentations in the head consistent with a contention that the victim had been pummeled with rocks. In conjunction with this observation, he noted that several blood-stained rocks were found in the immediate vicinity of the body. Second, he testified that the victim's head had suffered severe trauma and "bursting" from a crush injury most probably attributable to an automobile tire. He identified this second injury as the probable cause of death. Third, he testified to the presence of a second crush injury along the trunk and the abdominal section. This too the pathologist attributed to an automobile tire, which impacted the body from the opposite direction at least thirty seconds[1] after the fatal blow. He concluded, therefore, that the victim was twice run over - once while alive but presumably unconscious and a second time after death. A police detective also testified to the discovery of human blood and hair on the undercarriage of the recovered station wagon.

Shortly after the night of Crummett's death, Richmond was arrested on two unrelated murder charges. As he awaited proceedings on those charges in jail, he was served with an arrest warrant for the murder of Crummett, and he agreed to waive his rights and make a statement at that time. Although he admitted to robbing and beating Crummett, he claimed that he was not the driver when Crummett was run over. In his statement, which was taped and played at trial, Richmond insisted:

> I opened the door. I snatched the dude out by his collar, and bam, he falls straight out. I wanted to go through his pockets, but she [Corella] was already going through his pockets and he was getting up and I reached down and punched him again. So my old lady, Faith Erwin, she couldn't take it. She got out of the car and she looked and she started crying, you know. And about that time I am looking at her, and going through his change. And this rock, you know, like that, and dip, dip like that, you know. And I said, wow, to myself, you know. Come on let's get in the car and me and her [Erwin] get in the car, and I am talking to her [Erwin] and Rebecca [Corella] gets in the car and she backed up and she throws up in gear and comes back over. And we were going on down further and she was all over the fucking road, and said, give me this mother-fucking car and let me drive, you know.

[1]We do not believe the record supports the statement that the two injuries occurred "at least thirty seconds" apart. The actual trial testimony of the State pathologist, Dr. Holka, was that the time frame would be "approximately twenty seconds, if the heart were faster than fifteen if slower than twenty-five. So, we are giving a slight edge there and agreeing to about thirty seconds."

At the conclusion of the evidentiary phase of the trial, the judge instructed the jury that Richmond could be convicted of first-degree murder upon either a finding of premeditation or a felony-murder theory:

> Murder is the unlawful killing of a human being, with malice aforethought.
>
> * * * *
>
> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs as a result of the perpetration of, or attempt to perpetrate, the crime of robbery and where there was in the mind of the perpetrator the specific intent to commit such crime, is murder of the first degree.
>
> * * * *
>
> If a human being is killed by any one of several persons engaged in the perpetration of, or attempt to perpetrate, the crime of robbery, all persons who either directly and actively commit the act constituting such crime or who knowingly and with criminal intent aid and abet its commission or, whether present or not, who advise and encourage its commission, are guilty of murder in the first-degree, whether the killing is intentional, unintentional, or accidental.

Upon these and other instructions, the jury found Richmond guilty of first-degree murder on February 5, 1974.

Appendix A 2-6.

2. The First Sentencing Hearing and Appeal.

Pursuant to Arizona law, the sentencing hearing was held before the trial judge alone.

In his sentencing verdict, the trial judge found two "aggravating factors": a prior conviction involving a threat of violence,[2] and the commission of the instant offense in "a specially heinous and cruel manner". Appendix E 3. The judge rejected the defendant's proffered mitigation, holding that it did not make out any of the mitigating circumstances listed in the Arizona law, and imposed a sentence of death. Ibid.

After this sentencing, Mr. Richmond's lawyers filed a Petition for Post-Conviction Relief, based on newly discovered evidence which substantiated the defense claim that Rebecca Corella was actually driving the getaway car when it accidentally ran over Bernard Crummett. The Petition was supported by affidavits from

[2]The elements of the prior conviction (which was for a kidnapping incidental to a robbery) did not necessarily include a threat of violence. That element was established for purposes of this sentencing by testimony that, during the crime, the robbery victim was threatened with a knife. Subsequent Arizona caselaw has held such testimony improper:

> In order to use the prior conviction for sentencing purposes, the State must show that the particular crime can be perpetrated only with the use or threat of violence. The court then may consider only the statute that defendant is charged with violating; it may not consider other evidence, or bring in witnesses, to establish the violence element.

State v. Schaaf, 819 P.2d 909, 919-20 (Ariz. 1991).

two people who swore that Ms. Corella had admitted this to them.[3] The trial court denied the Petition without a hearing.

On appeal, the Arizona Supreme Court affirmed Mr. Richmond's conviction and sentence, rejecting all his state law claims and constitutional objections to his death sentence. State v. Richmond 560 P.2d 41 (Ariz. 1976). The Court also affirmed the denial of the post-conviction relief petition, holding that Mr. Richmond was "criminally liable for this murder regardless of whether he or his accomplice was driving the vehicle at the time in question." 560 P.2d 49.

In 1978, the United States District Court for the District of Arizona granted a petition for a writ of habeas corpus, invalidating Mr. Richmond's death sentence on the ground that the Arizona death penalty statute was invalid "for failing to allow for consideration of relevant mitigating factors of an individual's character by the sentencing court when a determination is to be made whether or not the death penalty should be imposed." Richmond v. Cardwell, 450 F.Supp. 519, 526 (D. Ariz. 1978). In State v. Watson, 586 P.2d 1253 (Ariz. 1978), the Arizona Supreme Court reached the same conclusion, holding that "the restriction in the showing of mitigating circumstances in the sentencing provisions of

[3]In response to the Petitioner's motion, the prosecutor filed an affidavit which stated that during the trial Ms. Corella had "threatened to take the stand for the defense and take the blame for the murder," but defense counsel had elected not to call her. Attached to the affidavit was a transcript of a taped statement by Ms. Corella, in which she said that Willie Richmond was driving the vehicle when Bernard Crummett was run over, "once".

our death penalty statute ... was unconstitutional," but "that the statute remained in full force and effect" so that previously sentenced capital defendants could have their cases "remanded for resentencing". 586 P.2d at 1264. Petitioner's was among those cases so remanded in light of Watson.

3. The Resentencing and Second Appeal.

At the resentencing hearing, the State presented three witnesses, all of whom testified regarding the defendant's prior record.[4] The defense called sixteen witnesses, on two subjects. Members of Mr. Richmond's family, friends, and two prison staff members testified about substantial changes Mr. Richmond had undergone while on death row. Three witnesses were presented regarding Rebecca Corella's admissions that she, not Mr. Richmond, was driving the car when it ran over and killed Bernard Crummett.

The second sentencing verdict was announced on March 13, 1980. The judge found three aggravating circumstances--the original two, plus a third based on a homicide conviction entered after the first sentence was imposed.[5] Appendix D 3. As in the first sentencing order, with regard to the "heinous, cruel or depraved" aggravating

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[4]The state again offered testimony from the victim of the prior kidnapping to establish that crime involved a "threat of violence." See note 2, above.

[5]The homicide on which the new aggravating circumstance was based occurred before Bernard Crummett's, but the conviction occurred after this death sentence was imposed. See App. C 7. Mr. Richmond was also subsequently tried on a third murder charge, at which the state's primary witness was Rebecca Corella, and the defense was that the crime was, in fact, committed by Ms. Corella; the jury acquitted Mr. Richmond on that charge.

factor, the judge stated without elaboration "that the defendant did commit the offense in this case in an especially heinous and cruel manner." Ibid.

The judge found proved most of the matters the defense had submitted in mitigation, except the defendant's changed character, as to which it said it was "unable to make a definitive finding." Appendix D 4-5. Among the facts the Court found in mitigation were that "Rebecca Corella was involved in the offense but was never charged" and "the jury was instructed both on matters relating to the felony murder rule, as well as matters relating to the premeditated murder." Id. at 4-6. The sentencing decision did not otherwise address the question of who was driving the car at the time it ran over Mr. Crummett and caused his death. It concluded:

> that considering both the enumerated circumstances in the statutes and the enumerated circumstances raised by the defense, and having considered them separately and as a whole, the Court finds that there are no mitigating circumstances sufficiently substantial to call for leniency.

Id. at 6.

On appeal, with one Justice dissenting, the Arizona Supreme Court once again upheld petitioner's death sentence. Appendix C. Among other things, the state court held that the sentence did not violate Enmund v. Florida, 458 U.S. 782 (1982), because he was an "active participant" in the crime. Id. at C-7.

> Even if we accept appellant's contention that he was not driving the car when the victim was run over, we do not believe this case falls within the parameters of Enmund.

Ibid. Somewhat confusingly--because the trial judge plainly made no determination of which of the robbers was driving--the appellate court said "the trial judge was justified in concluding that appellant drove the vehicle that was used to kill the victim." Ibid.[6] But its conclusion did not resolve the factual point:

> Under either version of the facts appellant does not fit within the sphere of defendants the Enmund court seeks to protect from capital considerations.

Ibid.

Although the court was unanimous on that, and several other legal points, there were three separate opinions, because the state Justices were divided as to the application of the "heinous, cruel or depraved" aggravating circumstance to the facts of this case. There was no disagreement on one point--that the trial court erred in finding the offense "especially cruel".

> We do not find the offense to be especially cruel; there is no evidence in the record to indicate the victim suffered more pain that that of the initial blow which rendered him unconscious.

Appendix C 8. The court was divided on the application of the remaining disjunctive terms of the "heinous" aggravating factor, however.

The two-Justice "majority" upheld the finding that the killing was "heinous" and said "the trial court could have found that the

[6]On a similarly uncertain basis, the appellate court said that petitioner "willingly assisted in the acts which were intended to cause the victim's death." Ibid. However, there was no direct evidence that anyone intended the victim's death; and the only circumstantial evidence of such an intent was in the hypothesized actions of the driver of the car.

offense was committed in an especially depraved manner." Ibid.

This is how they explained that conclusion:

> "Heinous" has been defined as "hatefully or shockingly evil; grossly bad," and "depraved" is "marked by debasement, corruption, perversion or deterioration." State v. Knapp, supra. Heinous and depraved involve the mental state and attitude of the offender as reflected in his words and actions. State v. Gretzler, supra; State v. Poland, supra; State v. Lujan, supra. In Gretzler, supra, we discussed factors which lead to a finding of heinousness or depravity. One factor is the infliction of gratuitous violence on the victim; another related factor is the needless mutilation of the victim. Here the victim was already unconscious and bleeding when he was run over not once, but twice, each time from a different direction. The evidence indicates that the first run by the vehicle was over the victim's head crushing his skull and killing him. The second run of the vehicle was over the body of the victim. The investigating officers found, at the location of the murder, two large pools of blood separated by about 30 feet, which was consistent with the body having been run over and dragged to where it was found. Again the fact that the victim in the instant case was run over twice and his skull was crushed, we find to be a ghastly mutilation of the victim.
>
> The presence of any one of the three elements--cruel, heinous, or depraved--is sufficient to constitute an aggravating circumstance. State v. Bishop, 127 Ariz. 531, 622 P.2d 478 (1980). We believe the facts of this case set it "apart from the normal first degree murders." State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979).

Appendix C 8.[7] The "majority" opinion then went on to conduct an "independent examination of the record to determine for ourselves the presence or absence of aggravating and mitigating circumstances and the weight to give to each." It concluded that "the mitigation offered by appellant is not sufficiently

[7]The panel opinion below quoted most, but not all of this language, omitting the last sentence of the first paragraph and the first sentence of the last paragraph. App. A 22. The panel opinion also omitted the sentences preceding these paragraphs, in which the Arizona Supreme Court "majority" had acknowledged that this crime could not be held to be "especially cruel." Ibid.

substantial to outweigh the aggravating circumstances," noting particularly the defendant's other murder conviction and "the gruesome manner in which this murder was committed. Id. at C-10.

Two Justices "concur[red] in the opinion of the majority except in its finding that this crime was especially heinous and depraved, and concur[red] in the result". Id. at C-13, based on the two other aggravating factors regarding the defendant's criminal record, which they found "places him above the norm of first degree murderers." See Id. at C-12. They did not discuss or weigh the mitigating evidence against those aggravating factors, in reaching this conclusion.

A fifth Justice dissented from the affirmance of the death sentence, agreeing "that the murder was not heinous and depraved," and arguing that the death penalty was inappropriate in light of the mitigation the defendant had shown. Appendix C 13-15. The mitigating evidence this Justice found most compelling was that which related directly to the remaining aggravating factors: the evidence of Mr. Richmond's changed character since the time of the crime and his conviction.

> Except in the physical sense, the defendant whom we today consign to the gas chamber is not the same person who committed the crime in 1974. While the passage of time should not be the test, we must acknowledge that in the ten years which it has taken to reach this point, the defendant has been given time to change. Perhaps those ten years should not have been allowed to pass, but we must remember that the statutes under which the defendant was previously sentenced to death were declared unconstitutional ... and, as a result, defendant has been given time which he has put to good use.

Appendix C 15 (dissenting opinion of Justice Feldman).

4. The Proceedings Below.

On January 6, 1984, Mr. Richmond's lawyers filed a Petition for Writ of Habeas Corpus in the United States District Court challenging his conviction and death sentence. The case was assigned to Judge Alfredo Marquez. On January 12, 1984--before the Respondent filed an answer--on his own motion, Judge Marquez summarily dismissed the Petition and refused to issue a certificate of probable cause to appeal. Mr. Richmond's lawyers appealed nonetheless, and on that appeal, the dismissal was reversed and remanded. Richmond v. Ricketts, 730 F.2d 1318 (9th Cir. 1984). On remand, Judge Marquez again summarily dismissed the petition and denied a certificate of probable cause. On appeal, the Court of Appeals again granted a certificate of probable cause and reversed and remanded. Richmond v. Ricketts, 774 F.2d 957 (9th Cir. 1985).

On the second remand, Judge Marquez again summarily dismissed the petition on his own motion, and again denied a certificate of probable cause, in a lengthy opinion which addressed the merits of the issues. Richmond v. Ricketts, 640 F.Supp. 767 (D. Ariz. 1986).

On appeal from that order, after granting a certificate of probable cause and then staying the case pending the resolution of Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc), cert. denied 110 S.Ct. 3287 (1990), and Walton v. Arizona, 110 S.Ct. 3047 (1990), a panel of the Court of Appeals affirmed. Appendix A. A timely petition for rehearing was filed, and rejected by the panel.

Appendix B 4. A suggestion for rehearing en banc was simultaneously denied after a vote of the full circuit court, four judges dissenting. Appendix A 37-47. This petition followed.

REASONS FOR GRANTING THE WRIT

The Court has previously examined Arizona's "heinous, cruel or depraved" aggravating factor, in Walton v. Arizona, supra, and Lewis v. Jeffers, 110 S.Ct. 3092 (1990). Those decisions settled two basic points about this statute: (1) its unadorned language is facially vague and unconstitutional under Maynard v. Cartwright, 486 U.S. 356 (1988), and (2) the Arizona Supreme Court has developed a narrowing construction of the statutory language which meets Eighth Amendment standards, and which it can apply itself where trial courts do not. See Walton v. Arizona, 110 S.Ct. at 3056-58; Lewis v. Jeffers, 110 S.Ct. at 3102. Those two points were understood by both the panel and dissenting opinions below, see Appendix A 19, 38-9, and are not at issue here.

The questions presented here arise out of the manner in which the Arizona Supreme Court in this case exercised its power, established by Walton and by Clemons v. Mississippi, 110 S.Ct. 1441 (1990), to cure the trial court's improper application of this aggravating factor, and the Court of Appeals panel's alternative grounds for approving of the state courts' action.

The first of those questions involves the responsibility of a state appellate court which undertakes to "itself determine whether the evidence supports the existence of the aggravating circumstance

as properly defined," Walton v. Arizona, 110 S.Ct. at 3057, to resolve the facts predicate to that determination.

The second--which is presently pending before the Court in Sochor v. Florida, No. 91-5843--involves the circumstances in which an appellate court reviewing a death sentence based partly on an inapplicable aggravating factor must "determine whether any remaining aggravating circumstances are sufficient to warrant the death penalty." Ibid.

I. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A REVIEWING COURT MAY APPLY A LIMITING CONSTRUCTION TO A FACIALLY VAGUE STATUTORY AGGRAVATING FACTOR IN A CAPITAL CASE, WITHOUT RESOLVING THE FACTUAL PREDICATE TO THAT APPLICATION.

In Parker v. Dugger, 111 S.Ct. 731 (1991), the Court examined a case in which a state appellate court had affirmed a death sentence, apparently on the basis of a mistaken assumption about the findings made by the trial court it was reviewing, regarding the mitigating circumstances that had been presented in the case. The Court held that the result of that state court process "deprived Parker of the individualized treatment to which he was entitled under the Constitution." 111 S.Ct. at 740. A similar deprivation occurred here, as a result of the actions of the "majority" Justices of the Arizona Supreme Court whose votes were essential to the affirmance of the death sentence in this case.

The sentencing decision the Arizona Supreme Court was faced with in this case was flawed, under both state and federal law. It rested on a determination that the crime for which Petitioner was convicted was "especially heinous and cruel." Appendix D 3. But

it was issued before the Arizona Supreme Court announced its decision in State v. Gretzler, 659 P.2d 1 (Ariz. 1983), which provided a limiting construction of those vague statutory terms;[8] and it included no explanation of the trial judge's understanding of them. The Arizona Supreme Court unanimously held its determination that the crime was "cruel" was erroneous. Appendix C 8. The remaining question was whether the crime could properly be called "heinous" or "depraved," under a limited construction of those terms.

To answer that, the "majority" opinion first recited the general "definition" that previous Arizona cases had given:

> "Heinous" has been defined as "hatefully or shockingly evil; grossly bad," and "depraved" is "marked by debasement, corruption, perversion or deterioration." State v. Knapp, supra. Heinous and depraved involve the mental state and attitude of the offender as reflected in his words and actions. State v. Gretzler, supra; State v. Poland, supra; State v. Lujan, supra....

Ibid. As this Court has twice unanimously held, such language alone adds no constitutionally significant "narrowing" to the facially vague statutory terms. See Shell v. Mississippi, 111 S.Ct. 313 (1990); Maynard v. Cartwright, 486 U.S. 356 (1988).[9] However, the Arizona court "majority" went beyond that, and made the following statements, which paralleled (but did not track) some of the specific categories of "heinous" or "depraved" behavior delineated in State v. Gretzler, supra:

> Here the victim was already unconscious and bleeding when he was run over not once, but twice, each time from a different direction. The evidence indicates that the first run by the vehicle was over the victim's head crushing his skull and killing him. The second run of the vehicle was over the body of the victim. The investigating officers found, at the location of the murder, two large pools of blood separated by about 30 feet, which was consistent with the body having been run over and dragged to where it was found. Again the fact that the victim in the instant case was run over twice and his skull was crushed, we find to be a ghastly mutilation of the victim.

Appendix C 8.

There are several possible interpretations of this passage. One--which we would submit it best supports--is that the Arizona

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[8]The Attorney General of Arizona summarized the Gretzler categories of "heinous" and "depraved" murders for this Court in Walton, as follows:

> The Arizona Supreme Court has held that a defendant's actions must fall into one of the following categories to constitute the aggravating circumstance: (1) relishing the murder; (2) infliction of gratuitous violence upon the victim above that which was necessary to complete the object of the crime; (3) needless mutilation of the victim; (4) senseless crime; or (5) helpless victim. State v. Gretzler, 659 P.2d at 11.

Brief of Respondent at 46, Walton v. Arizona, No. 88-7351.

[9]See Shell v. Mississippi, 111 S.Ct. at 313-14 (concurring opinion of Justice Marshall):

> "[T]he word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others." Shell v. State, 554 So.2d 887, 905-906 (Miss. 1989).
>
> "[T]he term 'heinous' means extremely wicked or shockingly evil; 'atrocious' means outrageously wicked and vile; 'cruel' means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others." Cartwright v. Maynard, 822 F.2d 1477, 1488 (CA10 1987) (en banc).

Ibid. See also Moore v. Clarke, 904 F.2d 1226, 1229-30 (8th Cir. 1990).

"majority" simply relied on the totality of the circumstances, and especially the "ghastly" results of this incident, to determine that the crime was "heinous" and "depraved." If so, its decision plainly violates the teachings of Godfrey v. Georgia, 446 U.S. 420 (1980),[10] and Maynard v. Cartwright, supra.

> This approach of reviewing the totality of circumstances surrounding the murder was rejected by the Supreme Court in Maynard v. Cartwright. The Tenth Circuit, in the Maynard opinion affirmed by the Supreme Court, held that '[c]onsideration of all the circumstances is permissible; reliance upon all the circumstances is not.' 822 F.2d 1477, 1491 (10th Cir. 1987) (en banc).

Moore v. Clarke, 904 F.2d at 1233. See also Newlon v. Armontrout, 885 F.2d 1328, 1334-5 (8th Cir.), cert. denied 110 S.Ct. 3301 (1990).

The panel below did not address this possibility, however. Instead, it held that the only question before it was whether a "rational factfinder" could have concluded that the statutory factor, as narrowed by the state court's previous limiting construction, was established on the record of this case. Appendix A 24-25. It held that the state court could have reached such a conclusion. Id. at A-26.

Even assuming the panel was correct in its identification of the issue before it, however, the question remains whether the standard of Jeffers and Jackson v. Virginia, 443 U.S. 307 (1979)

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[10] "An interpretation of [an aggravating circumstance] ... so as to include all murders resulting in gruesome scenes would be totally irrational." Godfrey v. Georgia, 446 U.S. at 433 n.16.

can be met, without a resolution by the state court of the basic factual predicate for the application of any limiting construction of this aggravating factor: Who caused the victim's death? As the dissenting judges below noted:

> Neither the jury, the sentencing court, nor the Arizona Supreme Court has expressly resolved the dispute over who drove the car over the victim's body. Yet the Arizona Supreme Court's conclusion that Richmond's mental state was "especially heinous" turns on the tacit assumption that he was the driver. Just as the jury's verdict did not necessarily determine that Richmond was the driver, the trial court's finding that the murder was "especially cruel or heinous" did not turn on any finding that Richmond was the driver. ... The findings and special verdict of the sentencing court do not even discuss the identity of the driver.

Appendix A 41.

> The opinion of the Arizona Supreme Court includes one sentence that suggests that the sentencing court resolved the credibility conflict and made a factual finding that Richmond drove the car. The court said that "the trial judge was justified in concluding that appellant drove the vehicle that was used to kill the victim." State v. Richmond, 666 P.2d 57, 63 (Ariz. 1983). This sentence suggests that the Arizona Supreme Court believed that the trial court made a finding about the driver's identity. If so, then the court was mistaken. There is simply nothing in the record to suggest that the trial judge made any conclusion about whether Richmond or Corella drove the car. If any state court can be said to have determined the identity of the driver, it is the Arizona Supreme Court, not the sentencing court. Yet the Arizona Supreme Court could not rationally determine whether it was Richmond or Erwin who was telling the truth.

Appendix A 42 n.4.

As these observations point out, the underlying problem with the Arizona Supreme Court majority's opinion on this issue is its failure to either take or assign responsibility for making the factual determinations which had to be made, in order to rationally

conclude[11] that petitioner's actions were "heinous" or "depraved" under any of the established limiting definitions of those terms. The opinion appears to rest its conclusion that those terms apply on the assumption that Mr. Richmond was driving; and it is difficult to conceive any other way that result could be reached. But the opinion never clearly resolves whether such a determination is necessary, and if so where and how it has been made.

As the dissent below argues, the answer best supported by the text of the state court "majority" opinion appears to be that the appellate judges believed the trial judge found Mr. Richmond was driving. If so, the resulting problem is the same as that in Parker v. Dugger, supra: "The [Arizona] Supreme Court erred in its characterization of the trial judge's findings, and consequently erred in its review of [Richmond's] sentence." 111 S. Ct. at 738.

Alternatively, the Arizona Justices may have, sub silentio, decided for themselves that Mr. Richmond was driving. But on the squarely conflicting testimonial record in this case, with the only trial level findings suggesting that Mr. Richmond may not have been the driver,[12] that would surely push, if not exceed, the limits of

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[11]Under Arizona law, before this or any other aggravating factor could be counted, it had to be proven to exist beyond a reasonable doubt. State v. Jordan, 614 P.2d 825, 828 (Ariz. 1980).

[12]See App. C 5 ("Rebecca Corella was involved in the offense but was never charged with any crime"); App. D 6 ("the jury was instructed both on matters relating to the felony murder rule, as well as matters relating to premeditated murder").

appellate factfinding permitted by due process. See Cabana v. Bullock, 474 U.S. 376, 388 n.5 (1986); Appendix A 42-43.

The only remaining possibility is that the Arizona "majority" did not find it necessary to resolve this question, because it did not feel bound by the narrowing definitions of "heinousness" established by the Arizona caselaw. If that is the case, their decision clearly cannot be sustained, under the Eighth Amendment rule of Godfrey v. Georgia itself. See also Shell v. Mississippi, supra; Newlon v. Armontrout, 885 F.2d at 1335.

Under any of these alternative interpretations the panel decision below is in error; and its error is one which raises important questions about the limits of the deference to state court decisionmaking Lewis v. Jeffers requires. Although Walton and Jeffers let the states determine where the capital sentencing responsibility will reside, Parker holds that responsibility must reside somewhere. By endorsing a diffusion of that responsibility to the point that it is impossible to say whether, where, or how "the Arizona Supreme Court applied its narrowing construction of Arizona's subsec. (F)(6) aggravating circumstance to the facts of [this] ... case," see Lewis v. Jeffers, 110 S. Ct. at 3100, the decision of the panel below is irreconcilable with the Court's "long-standing recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary." Saffle v. Parks, 110 S.Ct. 1257, 1262 (1990).

II. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A FEDERAL COURT MAY IGNORE A STATE'S DETERMINATION THAT ITS CAPITAL PUNISHMENT STATUTE REQUIRES A "WEIGHING" OF AGGRAVATING AND MITIGATING FACTORS AGAINST EACH OTHER.

As an alternative basis for its decision, the panel below held that any error respecting the "heinous" aggravating factor was irrelevant because two other aggravating circumstances remained. Appendix A 29. This holding--which was necessary to the disposition of this case, regardless of the correctness of the panel's first alternative ground for decision[13]--conflicts with the decisions of this Court in Walton and Clemons v. Mississippi, 110 S.Ct. 1441 (1990), and the Arizona Supreme Court's interpretation of its own death sentencing statute.

The effect on a sentence of a decision invalidating one of several aggravating circumstance on which it was based depends, first, on the role of aggravating circumstances under state law. Zant v. Stephens, 456 U.S. 410 (1982); Zant v. Stephens, 462 U.S. 862, 873 (1983). Arizona's statute provides that once an aggravating circumstance is found, the sentencing decision turns on whether any mitigating circumstances are "sufficiently substantial to warrant leniency." A.R.S. § 13-703E. Although the statute does not explicitly say that the "substantiality" of any mitigating

[13]The panel's determination that any error in applying the "heinous" aggravating factor was irrelevant goes to support both the state court "majority" opinion (as to which it stands as an alternative ground) and the state court concurring opinion (as to which it is the only possible ground for affirmance). Unless both of these two-state-Justice opinions are valid, petitioner's death sentence cannot stand--because the fifth state Justice voted to reverse it. See App. C 14.

factors depends, in part, on the number and nature of the aggravating factors found, the Arizona Supreme Court has repeatedly so held.

> [The trial court and this] court on review must determine whether the mitigating circumstances are "sufficiently substantial to call for leniency." ... This necessarily involves the difficult weighing and balancing of the aggravating and mitigating circumstances present.

State v. Gretzler, 659 P.2d 1, 13 (Ariz. 1983).

> We have described the formula of "sufficiently substantial to call for leniency" as involving the weighing of aggravating against mitigating circumstances on the basis of the gravity of each circumstance.

State v. Harding, 670 P.2d 383 (Ariz. 1983).[14] Indeed, in its review of the sentence in this case, the Arizona Supreme Court "majority" said "the mitigation offered by appellant is not sufficient to outweigh the aggravating circumstances"--which, in its view, included the "heinous" aggravating factor and "the gruesome manner in which this murder was committed." Appendix C 11. The premise of this resentencing requirement is that different numbers of aggravating factors carry different weights. See State v. Schaaf, 819 P.2d at 921 ("[w]e do not know and cannot ascertain whether the trial court would have found the mitigating circumstances sufficient to overcome the single remaining aggravating circumstance.").

[14]See also State v. Fierro, 804 P.2d 72, 81 (Ariz. 1990); State v. Jimenez, 799 P.2d 785, 794 (Ariz. 1990); State v. Serna, 787 P.2d 1056, 1065 (Ariz. 1990); State v. Marlow, 786 P.2d 395, 402 (Ariz. 1989); State v. Rossi, 706 P.2d 371, 379 (Ariz. 1985); State v. Brookover, 601 P.2d 1322, 1326 (Ariz. 1979).

Consistent with this, and its limited appellate role in the sentencing-determination process, the Arizona Supreme Court has established as its "usual practice in a case such as this is to remand to the trial court for reconsideration of the death sentence in light of our findings of aggravation and mitigation." State v. Fierro, 804 P.2d at 88. "[I]f one of the two statutory aggravating circumstances found by the trial court is set aside, we must remand for resentencing." State v. Schaaf, 819 P.2d at 920; see also, e.g., State v. Hinchey, 799 P.2d 352 (Ariz. 1990); State v. Lopez, 786 P.2d 959, 963 (Ariz. 1990); State v. Gillies, 662 P.2d 1007, 1023 (Ariz. 1983).

Despite this clear and definitive construction of this statute by the Arizona state courts, the panel below held exactly the opposite. It declared "[i]nvalidation of an aggravating circumstance does not mandate reweighing or require resentencing...." Appendix C 29. It denied that "the invalidation of an aggravating circumstance necessarily renders any evidence of mitigation 'weightier' or more substantial in a relative sense...." Appendix A 30. In effect--although not, in its amended opinion, in word[15]--the panel held "without citing any caselaw, that Arizona is not a weighing state." Appendix A 44. As the dissenting Judges

[15]The original panel opinion summarized its analysis in the direct declaration that "the statute at issue here is not a weighing statute." Richmond v. Lewis, 921 F.2d at 947. On rehearing, this phrase was deleted, but the panel's analysis was not changed. See App. A 29.

below showed, this cannot be squared with the language of Arizona's law, or the manner in which the Arizona courts have construed it.

> Without citing any authority, the panel mistakenly concludes that the aggravating circumstances do not influence the Arizona sentencer's inquiry into whether the mitigating circumstances are sufficiently substantial. 921 F.2d at 947. On the contrary, it is clear that the trial judge determines whether the mitigating circumstances are "sufficiently substantial" by evaluating them in relation to the aggravating circumstances that exist. This is a balancing, a process of weighing. Numerous cases of the Arizona Supreme Court confirm that the sentencer determines whether mitigating evidence is "sufficiently substantial" by weighing it against aggravating circumstances.

Appendix A 44.

> In Richmond's case, the trial court found that there were a number of mitigating circumstances. See State v. Richmond, 666 P.2d 57, 65 (Ariz. 1983). It was only by comparing them to the aggravating circumstances that the sentencer concluded that they were not sufficiently substantial to warrant leniency. If a reviewing court's analysis reduces the number of valid aggravating circumstances, it reduces the weight and gravity of the aggravating factors that the sentencer may permissibly consider. The reviewing court can no longer rely on an earlier finding that the mitigating circumstances were not sufficiently substantial to call for leniency. A new balancing must be conducted in order to determine whether the mitigating circumstances are sufficiently substantial in relation to the remaining valid aggravating factors. The panel fails to recognize that the findings of no mitigating circumstances sufficiently substantial to call for leniency is simply the end result of the balancing or weighing that the Arizona statute requires. It is not an isolated finding of fact. It depends on the nature and gravity of the aggravating circumstances. If the sentencing court weighed the mitigating circumstances against both valid and invalid aggravating circumstances, then the sentence of death cannot stand. At a minimum, there would have to be a determination whether the mitigating circumstances, when weighed against the remaining valid aggravating circumstances, were sufficiently substantial to call for leniency.

Appendix A 46. To fail to require that violates not only established Arizona law, but the Eighth Amendment principle reiterated in Clemons v. Mississippi:

> An automatic rule of affirmance in a weighing State would be invalid under Lockett v. Ohio, 438 U.S. 586 ... (1978), and Eddings v. Oklahoma, 455 U.S. 104 ... (1982), for it would not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances. Cf. Barclay v. Florida, 463 U.S. 939, 958 ... (1983).

Clemons v. Mississippi, 110 S.Ct. at 1450.

The decision below on this point places the Ninth Circuit in conflict with the Arizona Supreme Court, regarding the very nature of the task that both sentencing and reviewing courts are to perform in Arizona capital cases. That potentially impacts not only the 100-plus Arizona death sentences pending at various stages of state and federal review, but also every case at the trial level--where sentencing judges, presumed to know and follow the law, Walton v. Arizona, 110 S.Ct. at 3057, must decide how and what to weigh in the balance of life and death. It has similarly sweeping implications for the several other states whose sentencing statutes use formulae similar to Arizona's.[16] It evidences a misinterpretation of Clemons' teachings--and the general principles of federal harmless error analysis, from which Clemons derives--

[16]There are at least four other states---including two in the Ninth Circuit--whose capital sentencing statutes make the sentence depend on the "sufficiency" of mitigating circumstances. Illinois Ann. Stat. ch. 38, para. 9-1(g); Montana Code Ann. § 46-18-305; Nebraska Rev. Stat. § 29-2522; Washington Rev. Code § 10.95.060(4).

which do not admit mechanistic rules which simply pretend the error did not occur, without acting to cure it. Cf. Pensinger v. California, 60 U.S.L.W. 3302 (U.S., October 22, 1991) (dissenting statement of Justices O'Connor and Kennedy).

As the grant of certiorari in Sochor v. Florida suggests, the lower courts are in need of further clarification of these principles, and their application to the varieties of state capital punishment laws. Because the panel's decision underscores that need, because it denies petitioner the fully individualized sentencing determination which was his right under the Eighth Amendment, and because it conflicts directly with the decisions of the Arizona Supreme Court itself, review should be granted here and the panel decision reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIE LEE RICHMOND, *Petitioner-Appellant,* v. SAMUEL A. LEWIS,* Director, Arizona Department of Corrections; and ROGER CRIST, Superintendent of the Arizona State Prison, *Respondents-Appellees.*	No. 86-2382 D.C. No. CV-84-010-T-ACM ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Arizona
Alfredo C. Marquez, District Judge, Presiding

Argued and Submitted September 18, 1987
Submission Vacated September 22, 1987
Reargued and Submitted September 27, 1990
San Francisco, California

Filed December 26, 1990
Amended December 18, 1991

Before: Arthur L. Alarcon and Diarmuid F. O'Scannlain, Circuit Judges, and Albert Lee Stephens,** District Judge.

Opinion by Judge O'Scannlain; Dissent by Judge Pregerson, with whom Judges Hug, Norris and Reinhardt join.

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*Samuel A. Lewis and Roger Crist have been substituted for their respective predecessors in office, James R. Ricketts and Donald Wawrzaszek, pursuant to Federal Rule of Appellate Procedure 43(c)(1).

**The Honorable Albert Lee Stephens, United States District Judge for the Central District of California, sitting by designation.

OPINION

O'SCANNLAIN, Circuit Judge:

Willie Lee Richmond, who was sentenced to death upon conviction of first-degree murder in Arizona state court, appeals from the district court's denial of his petition for habeas corpus. He contends that imposition of capital punishment will violate his rights under the sixth, eighth, and fourteenth amendments. We now affirm.

I

A

This case arises from Richmond's conviction in 1974 for first-degree murder in the death of Bernard Crummett. On an August evening seventeen years ago, the victim met Rebecca Corella, a nude dancer, at the Bird Cage Bar in Tucson, Arizona. After leaving the bar, the pair met Richmond in the bar's parking lot where Corella attempted to persuade Richmond to allow his fifteen-year-old girlfriend, Faith Erwin, to prostitute herself with Crummett. Richmond and Erwin refused, and after a brief conversation, Corella agreed to have

sex with Crummett herself. Crummett thereupon produced a twenty-dollar bill, which Corella handed to Richmond and which Richmond palmed and surreptitiously exchanged for a ten. A brief argument ensued as Richmond and Corella insisted that Crummett had only given them ten dollars.

Crummett eventually yielded and agreed to pay more. As he reached into his wallet a second time, Corella observed what seemed a considerable amount of cash, and she communicated her observation to Richmond. All four individuals then proceeded in a borrowed station wagon to Corella's motel-room apartment. There, just as Corella and Crummett emerged from the bedroom, Richmond whispered to Erwin his intention that they rob Crummett, explaining that they should not commit the crime in the apartment because Crummett might remember the surroundings.

The group then left the motel and with Richmond as their driver proceeded to the end of a road on the outskirts of Tucson. Richmond thereupon stopped the car, and either Richmond or Corella — the testimony conflicts — told Crummett to get out because the car had suffered a flat tire. Richmond then assaulted Crummett, beating him with his fists and knocking Crummett to the ground. As Crummett lay motionless, Richmond pelted him with rocks. Corella, meanwhile, grabbed Crummett's wallet. According to Erwin, who admitted that she was vomiting and "coming down" from heroin during the incident, the following events then transpired:

> Q. [Mr. Howard, Prosecutor]
> Then what happened?
>
> A. [Erwin]
> Well, they all got in the car, and Becky [Corella] was getting the wallet and what else, you know. I looked over to see what else was taken. And Becky [Corella] was getting the wallet and we came in the car and left.

Q. And where did you go from there?

A. Back to the Sands Motel.

Q. Did you run over anything?

A. Yes, a man. It was a bump, after we were leaving.

Q. After you felt that bump, was anything said in the car when you felt that bump?

A. Becky [Corella] said, it felt like a man's body.

Q. Who was driving the car?

A. Willy [sic].

Under cross-examination, Erwin stood by her contention that Richmond had been the driver at the time the car ran over Crummett. She admitted, however, that she was suffering greatly under the influence of her drug injections at the time and that she was lying back on the car seat with her eyes closed.

The police found Crummett's body at five o'clock the following morning. The examining pathologist testified at trial that the body exhibited signs of three forms of extreme force. First, there were wounds and indentations in the head consistent with a contention that the victim had been pummeled with rocks. In conjunction with this observation, he noted that several blood-stained rocks were found in the immediate vicinity of the body. Second, he testified that the victim's head had suffered severe trauma and "bursting" from a crush injury most probably attributable to an automobile tire. He identified this second injury as the probable cause of death. Third, he testified to the presence of a second crush injury along the trunk and the abdominal section. This too the

pathologist attributed to an automobile tire, which impacted the body from the opposite direction at least thirty seconds after the fatal blow. He concluded, therefore, that the victim was twice run over — once while alive but presumably unconscious and a second time after death. A police detective also testified to the discovery of human blood and hair on the undercarriage of the recovered station wagon.

Shortly after the night of Crummett's death, Richmond was arrested on two unrelated murder charges. As he awaited proceedings on those charges in jail, he was served with an arrest warrant for the murder of Crummett, and he agreed to waive his rights and make a statement at that time. Although he admitted to robbing and beating Crummett, he claimed that he was not the driver when Crummett was run over. In his statement, which was taped and played at trial, Richmond insisted:

> I opened the door. I snatched the dude out by his collar, and bam, he falls straight out. I wanted to go through his pockets, but she [Corella] was already going through his pockets and he was getting up and I reached down and punched him again. So my old lady, Faith [Erwin], she couldn't take it. She got out of the car and she looked and she started crying, you know. And about that time I am looking at her, and going through his change. And this rock, you know, like that, and dip, dip like that, you know. And I said, wow, to myself, you know. Come on let's get in the car and me and her [Erwin] get in the car, and I am talking to her [Erwin] and Rebecca [Corella] gets in the car and she backed up and she throws up in gear and comes back over. And we were going on down further and she was all over the fucking road, and said, give me this mother-fucking car and let me drive, you know.

At the conclusion of the evidentiary phase of the trial, the judge instructed the jury that Richmond could be convicted of

first-degree murder upon either a finding of premeditation or a felony-murder theory:

> Murder is the unlawful killing of a human being, with malice aforethought.
>
> * * * *
>
> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs as a result of the perpetration of, or attempt to perpetrate, the crime of robbery and where there was in the mind of the perpetrator the specific intent to commit such crime, is murder of the first degree.
>
> * * * *
>
> If a human being is killed by any one of several persons engaged in the perpetration of, or attempt to perpetrate, the crime of robbery, all person[s] who either directly and actively commit the act constituting such crime or who knowingly and with criminal intent aid and abet its commission or, whether present or not, who advise and encourage its commission, are guilty of murder in the first-degree, whether the killing is intentional, unintentional, or accidental.

Upon these and other instructions, the jury found Richmond guilty of first-degree murder on February 5, 1974.[1]

[1]On August 9, 1974, Richmond was convicted of first-degree murder on one of the two unrelated charges and sentenced to life imprisonment. "It is not disputed that the killing that was the basis of th[at] conviction occurred prior to the murder of Bernard Crummett." *Richmond v. Ricketts*, 640 F. Supp. 767, 780 (D. Ariz. 1986). At the time of that earlier murder, "the death [penalty] had not yet become effective [in Arizona] so that the sentence of life imprisonment was the only possible sentence." *Id.* Richmond was acquitted of the other murder. *See id.*

B

After a separate hearing held before the trial judge alone, the court pronounced its sentence:

> The court rendered a special verdict finding the existence of two aggravating circumstances: 1) that the defendant was previously convicted of a felony involving the use or a threat of violence on other persons, and 2) that the defendant had committed the offense in an especially heinous and cruel manner. It found none of the statutory mitigating circumstances to be present. Based on its findings, the court sentenced the defendant to death.

State v. Richmond, 114 Ariz. 186, 189, 560 P.2d 41, 44, *cert. denied*, 433 U.S. 915 (1976).

Richmond petitioned in state court for post-conviction relief claiming the discovery of new exculpatory evidence. He presented an affidavit from Daniel McKinney, a former boyfriend of Corella, in which McKinney stated that Corella had admitted to being the driver when the car ran over Crummett. The state countered with a transcribed tape recording in which McKinney claimed that Richmond had threatened him in prison. The petition for relief was denied. On automatic appeal, the Arizona Supreme Court affirmed both the conviction and the sentence, holding inter alia that (1) Richmond's case was properly submitted on a theory of felony murder, (2) post-conviction relief was properly denied, and (3) the Arizona death penalty statute was constitutional, both as written and as applied. *See* 114 Ariz. at 190-98, 560 P.2d at 45-53.

After the United States Supreme Court denied certiorari on direct appeal, Richmond petitioned for a writ of habeas corpus in the federal district court of Arizona. He argued that the Arizona statute unconstitutionally deprived him of the opportunity to present non-statutory mitigating circumstances before

the judge at sentencing. The district court upheld Richmond's conviction but ruled the Arizona statute unconstitutional under the eighth and fourteenth amendments for its failure to allow consideration of a convict's character. *Richmond v. Cardwell*, 450 F. Supp. 519 (D. Ariz. 1978). The court therefore vacated Richmond's sentence.[2]

At a second sentencing hearing in March 1980, the state trial court again found no mitigating circumstances sufficient to warrant leniency, and it resentenced Richmond to death. Once again, on mandatory appeal, the Arizona Supreme Court affirmed the sentence. *State v. Richmond*, 136 Ariz. 312, 666 P.2d 57, *cert. denied*, 464 U.S. 986 (1983). Independently reviewing the record,[3] the state supreme court found that Richmond had actively participated in the robbery and had played an integral role in the events leading up to Crummett's death. Although it acknowledged that the force of Richmond's manual blows had not caused the death, the court held that circumstantial evidence supported Erwin's testimony that Richmond had been the lethal driver. It found that the sentence was appropriate under these conditions. Again on direct review, the United States Supreme Court denied certiorari. 464 U.S. 986 (1983).

Richmond then pursued a second writ of habeas corpus in federal court. After a brief hearing, the district court denied the writ and dismissed the petition. Four days later, a panel of this court stayed Richmond's execution and issued a certificate of probable cause to provide time for a full-fledged appeal. In due course, the court affirmed dismissal for failure to exhaust state remedies, but it remanded with instructions to allow amendment to permit the prosecution of any claims that

[2]The Arizona death penalty statute was subsequently revised to cure this defect. *See* Ariz. Rev. Stat. Ann. § 13-703(G), *as amended by* 1979 Ariz. Sess. Laws ch. 144, § 1 (effective May 1, 1979).

[3]*See infra* note 10.

had been properly exhausted.[4] *Richmond v. Ricketts*, 730 F.2d 1318 (9th Cir. 1984). Following such amendment, the district court again denied Richmond's petition, and this court again reversed, remanding for a full review of the state record. *Richmond v. Ricketts*, 774 F.2d 957 (9th Cir. 1985). After reviewing the full record, the district court denied Richmond's petition for the third time in a thirty-five page opinion. *Richmond v. Ricketts*, 640 F. Supp. 767 (D. Ariz. 1986).

Richmond now appears before this court with the assistance of counsel to appeal this most recent denial order. This court originally entertained oral argument in his appeal on September 18, 1987, but deferred submission pending the en banc decision of this circuit in *Adamson v. Ricketts*. *See* No. 84-2069 (9th Cir. Aug. 14, 1987) (en banc) (order scheduling oral argument for Oct. 20, 1987, in light of *Ricketts v. Adamson*, 483 U.S. 1 (1987)). *Adamson* presented a similar challenge to the constitutionality of Arizona's revised death penalty statute. A year later, in December 1988, the *Adamson* court ruled the Arizona statute unconstitutional. 865 F.2d 1011 (9th Cir. 1988) (en banc). Arizona petitioned the Supreme Court of the United States for review of that decision, and this court further deferred submission pending that outcome.

In the meantime, on direct review from the state's highest court, the Supreme Court of the United States announced in *Walton v. Arizona* that the Arizona death penalty statute is *not* unconstitutional. 110 S. Ct. 3047 (June 27, 1990), *reh'g denied*, 111 S. Ct. 14 (Aug. 30, 1990). In a companion case

[4]Under the "total exhaustion rule" announced by the Supreme Court in *Rose v. Lundy*, 455 U.S. 509 (1982), a federal court cannot adjudicate a habeas petition if it contains any unexhausted claims — even if it also contains exhausted claims. The remand order was intended to satisfy this rule. *See* 730 F.2d at 1318.

Upon amending his petition, Richmond continued to assert eighteen claims. *See* 774 F.2d at 959.

decided that same day, *Lewis v. Jeffers*, the Court restated and elaborated upon its *Walton* holding. 110 S. Ct. 3092, *reh'g denied*, 111 S. Ct. 14 (1990). On the following day, the Court denied certiorari in *Adamson*. *Lewis v. Adamson*, 110 S. Ct. 3287 (1990), *denying cert. to Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) (en banc).

In light of these developments, this court ordered the parties to file supplemental briefs, and on September 27, 1990, the court entertained a second oral argument to consider the effects of *Walton*, *Jeffers*, and other recent Supreme Court decisions on this appeal. The court thereafter took the entire appeal under submission for decision.

II

A

The district court had proper jurisdiction under 28 U.S.C. § 2241. This court has proper jurisdiction under 28 U.S.C. § 2253. We review the denial of a habeas corpus petition de novo. *See Weygandt v. Ducharme*, 774 F.2d 1491, 1492 (9th Cir. 1985). However, under 28 U.S.C. § 2254(d), the factual findings of state trial and appellate courts are presumed correct if fairly supported by the record. *See Sumner v. Mata*, 449 U.S. 539, 546-47 (1981).

B

Richmond has presented four arguments: (1) that Arizona's death penalty law is unconstitutional both on its face and as applied, (2) that the trial court never specifically found that he caused, intended to cause, or attempted to cause Crummett's death and that imposition of the death penalty would therefore violate the rule of *Enmund v. Florida*, 458 U.S. 782 (1982), (3) that he was improperly denied an evidentiary hearing on his claim that Arizona's administration of the death penalty is unconstitutionally discriminatory, and (4) that fulfillment of

his sentence after so many years on death row would constitute cruel and unusual punishment. Respondent Arizona has challenged all four contentions and has further argued that Richmond's petition constitutes an abuse of the writ. We address the state's latter contention first and then address Richmond's arguments sequentially.

III

In its 1978 judgment on Richmond's first petition for habeas relief, the district court vacated Richmond's sentence but affirmed his conviction. The State of Arizona argues that because Richmond failed to appeal the affirmance of his conviction at that time, it is abuse of the writ to challenge the conviction now. *See* 28 U.S.C. § 2244(b); Rules Governing Section 2254 Cases, Rule 9(b). A prior panel of this court has already addressed this contention. *See Richmond*, 774 F.2d at 959-61. We are bound to adopt its conclusions as the law of the case. *See Handi Inv. Co. v. Mobil Oil Corp.*, 653 F.2d 391, 392 (9th Cir. 1981); *see also* 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.404[1], at 119 (2d ed. 1988) ("If there is an appeal from the judgment entered after remand, the decision on the first appeal establishes the law of the case to be followed on the second.").

[1] Thus, to the extent that Richmond seeks to challenge his conviction on grounds that were available to him when he filed his first petition, we agree that he is barred from doing so now:

> The relief obtained on the first petition went only to the sentence. The incentive remained, therefore, for Richmond to appeal the rejection of his challenges to the *underlying conviction*, since if he were to prevail on appeal on these claims, he could not be resentenced. The district court could properly decline to reconsider these underlying-conviction claims when raised in a second petition.

Richmond, 774 F.2d at 960 (emphasis in original). Whether termed abuse of the writ or res judicata, the reassertion of such claims is not permissible at this stage.

[2] Richmond, however, has focused his attention in the current appeal on challenging the re-imposition of his sentence. This he certainly may do, and in so doing, he may challenge the death penalty on grounds that were available to him but that he did not raise when contesting his first sentence:

> Previously unadjudicated claims must be decided on the merits unless the petitioner has made a conscious decision deliberately to withhold them, is pursuing "needless piecemeal litigation," or has raised the claims only to "vex, harass, or delay." None of these three situations applies to Richmond's petition.

Id. at 961 (citing *Sanders v. United States*, 373 U.S. 1, 18 (1963)). Richmond may also renew challenges to the death penalty that were raised in his first petition and *decided against him* by the district court:

> [W]hen the district court enjoined Richmond's [initial] death sentence, it relied solely on the [original] Arizona statute's failure to consider mitigating factors of an individual's character. *Richmond v. Cardwell*, 450 F. Supp. at 526. Because Richmond had obtained the sentencing relief he sought, he had no incentive to appeal the adverse determination of his other grounds for challenging the death sentence, and perhaps would not have been permitted to do so on mootness or ripeness grounds. The ends of justice would not be served by denying Richmond appellate consideration of these other constitutional challenges to the death penalty merely because he obtained relief on a different ground.

Id. at 960. With respect to any of the proffered challenges to his sentence, therefore, "Richmond's petition does not constitute an abuse of the writ." *Id.* at 961.

IV

A

At the time of Richmond's conviction in 1974, Arizona law defined first-degree murder in relevant part as follows: "A murder which is perpetrated by . . . any . . . kind of wilful, deliberate and premeditated killing, or which is committed . . . in the perpetration of, or attempt to perpetrate . . . robbery . . . is murder of the first degree." Ariz. Rev. Stat. Ann. § 13-452 (repealed 1978) (current version at § 13-1105). For those convicted of first-degree murder, the Arizona code provides a sentencing hearing independent of the trial. § 13-703(B). Here, the trial judge must choose without the assistance of a jury between the options of life imprisonment and capital punishment. § 13-703(A)-(B). For purposes of this determination, a special verdict is required regarding the existence or non-existence of any aggravating or mitigating factors. § 13-703(D). The statute puts the burden of establishing the existence of any aggravating factors on the prosecution and the burden of establishing the existence of any mitigating factors on the defense. § 13-703(C). The statute then channels the court's discretion:

> [T]he court . . . shall impose a sentence of death if the court finds *one or more* of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

§ 13-703(E) (emphasis added).

Subsection F enumerates ten aggravating circumstances, including the following three:

(1) The defendant was previously convicted of a felony in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

(2) The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

* * * *

(6) The defendant committed the offense in an especially heinous, cruel or depraved manner.

§ 13-703(F). By the time of Richmond's resentencing in 1980, subsection G of the statute had been revised to read as follows:

> Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any circumstances of the offense, including but not limited to [(1) the defendant's incapacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law, (2) the defendant's suffering of unusual or substantial duress, (3) the defendant's relatively minor participation in the crime, (4) the defendant's reasonable inability to foresee that his conduct would cause or would create the grave risk of causing death, and (5) the defendant's age].

§ 13-703(G).

B

Richmond challenges the constitutionality of this revised sentencing scheme on four grounds. First, he contends that

judicial determination of the existence or nonexistence of aggravating circumstances impermissibly usurps the jury's fact-finding function. Second, he claims that requiring the defense to establish the existence of any mitigating circumstances illegitimately shifts the burden of proof. Third, he argues that the Arizona statute creates an unconstitutional presumption that death is the proper sentence. Finally, he insists that imposing the death penalty upon finding that the killing was "especially heinous, cruel or depraved" is unconstitutionally vague.

[3] The Supreme Court's recent decision in *Walton v. Arizona* specifically addressed and rejected the first three contentions, and Richmond has not forcefully advanced these arguments since.[5] With respect to the judicial determination of sentencing factors, the Court stated: " 'Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court.' " *Walton*, 110 S. Ct. at 3054 (quoting *Clemons v. Mississippi*, 110 S. Ct. 1441, 1446 (1990)). Indeed, even before *Walton*, it was well settled that " 'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.' " *Id.* (quoting *Hildwin v. Florida*, 490 U.S. 638, _, 109 S. Ct. 2055, 2057 (1989)); *see generally id.* at 3054-55 (Part II of the opinion). As the district court noted when it rejected this argument in Richmond's first petition:

[5]We have already had occasion to note *Walton*'s rejection of the first and third contentions. *See Smith v. McCormick*, 914 F.2d 1153, 1169-70 (9th Cir. 1990). We also note in passing that Richmond's able and experienced counsel, Timothy K. Ford, is intimately familiar with the *Walton* case. Mr. Ford represented Jeffrey Alan Walton in his petition before the United States Supreme Court. This fact — in addition to the cases' underlying similarity — may help to explain why several of the arguments raised here are identical to arguments decided by the Court in that case. *See infra* note 7 (noting the factual similarities between the two cases).

> "[The Supreme Court] has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."

Richmond, 450 F. Supp. at 523 (quoting *Proffitt v. Florida*, 428 U.S. 242, 252 (1976)).[6]

[4] The *Walton* Court likewise rejected the contention that requiring the defendant to establish the existence of mitigating factors impermissibly shifts the burden of proof. Denying that the practice violates the eighth and fourteenth amendments, the Court ruled:

> So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency.

[6]Since the *Walton* decision, Richmond has apparently conceded that the sixth amendment does not require jury factfinding at the sentencing phase in capital punishment cases, but he has stressed the alternative argument that the equal protection clause *does* require jury factfinding at sentencing. Because Arizona law provides for jury factfinding in many similar circumstances, Richmond contends, it is arbitrary and irrational not to provide for it here. We find this argument unpersuasive. As the Supreme Court noted in *Proffitt*, there is indeed a rational reason for committing the factfinding function to the judge at the sentencing phase in capital punishment cases, and it probably promotes more evenhanded justice to do so. *See Proffitt*, 428 U.S. at 252. Moreover, the Court's sixth amendment holding on this issue in *Walton* would make little sense if the broader, less specific terms of the equal protection clause could be read to require the opposite result.

Walton, 110 S. Ct. at 3055; *see generally id.* at 3055-56 (Part III of the opinion).

[5] Finally, the *Walton* Court also rejected the claim that the Arizona statute creates an impermissible presumption that death is the proper sentence for first-degree murder. Like Richmond, Walton had challenged the statute's directive that a court "*shall* impose a sentence of death" if it finds one or more aggravating circumstances and no substantial mitigating circumstances. Ariz. Rev. Stat. Ann. § 13-703(E) (emphasis added). Walton had contended, as Richmond does here, that this provision violates the proscription against mandatory death sentences announced in *Woodson v. North Carolina*, 428 U.S. 280 (1976). The Court disagreed, citing its recent decisions in *Blystone v. Pennsylvania*, 110 S. Ct. 1078 (1990), and *Boyde v. California*, 110 S. Ct. 1190, *reh'g denied*, 110 S. Ct. 1961 (1990), both of which had upheld similarly worded capital punishment laws. The Court ruled that so long as the statute provides individualized sentencing and does not automatically impose death for certain categories of murder, it passes constitutional muster under *Woodson*. *See generally Walton*, 110 S. Ct. at 3056 (Part IV of the opinion).

In short, the Supreme Court has specifically rejected three of the constitutional arguments raised here, and it has done so in the context of reviewing the very same statute.

C

Richmond insists, however, that his fourth constitutional challenge to the statute survives *Walton*. Indeed, he contends that *Walton* itself renders his death sentence unconstitutional and that this court's en banc decision in *Adamson v. Ricketts* mandates resentencing. *See Adamson*, 865 F.2d 1011 (9th Cir. 1988) (en banc), *cert. denied sub nom. Lewis v. Adamson*, 110 S. Ct. 3287 (1990). We are not persuaded.

In *Walton*, another Arizona inmate who was convicted of first-degree murder and sentenced to death challenged his sentence on constitutional grounds.[7] The Supreme Court denied all four of his claims and affirmed the sentence. Despite this result, Richmond contends that Walton's fourth claim and the Court's disposition of that claim bolster his petition.[8]

[7]The facts of the *Walton* case are strikingly similar in many respects to the facts of the present case. Walton, who also acted with the assistance of two friends, "went to a bar in Tucson, Arizona, . . . intending to find and rob someone at random, steal his car, tie him up, and leave him in the desert . . . . In the bar's parking lot, the trio encountered Thomas Powell, a young, off-duty Marine." 110 S. Ct. at 3052. Forcing Powell to accompany them, the three commandeered his car and drove to a remote area on the outskirts of town. When they stopped, they

> forced Powell out of the car and had him lie face down on the ground near the car while they debated what to do with him. . . . Walton then took a .22 caliber derringer and marched Powell off into the desert. After walking a short distance, Walton forced Powell to lie down on the ground, placed his foot on Powell's neck, and shot Powell once in the head. Walton later told [his two accompanying friends] that he had shot Powell and that he had "never seen a man pee in his pants before."

Id. Despite the similarities, the circumstances of Powell's death were somewhat more gruesome than those of Crummett's:

> Powell's body was found approximately a week later .... A medical examiner determined that Powell had been blinded and rendered unconscious by the shot but was not immediately killed. Instead, Powell regained consciousness, apparently floundered about in the desert, and ultimately died from dehydration, starvation, and pneumonia approximately a day before his body was found.

Id.

[8]Walton's first three claims, which were also raised by Richmond, were the three claims discussed in Part IV-B above. First, Walton alleged that "every finding of fact underlying the sentencing decision must be made by a jury, not by a judge." 110 S. Ct. at 3054; *compare* Ariz. Rev. Stat. Ann. § 13-703(B). Second, he alleged that the Arizona statute unconstitutionally "imposes on defendants the burden of establishing, by a preponderance of the evidence, the existence of mitigating circumstances." 110 S. Ct. at

In his fourth claim, Walton alleged that the aggravating circumstance found and relied upon by the sentencing judge — his commission of the crime "in an especially heinous, cruel or depraved manner" — was unconstitutionally vague. Ariz. Rev. Stat. Ann. § 13-703(F)(6); *see* 110 S. Ct. at 3056-57. The Supreme Court agreed that the relevant statutory provision was vague but did not agree that it was unconstitutional. In essence, the Court held that facial vagueness alone does not decide the question: one must look beyond the language of the suspect provision and consider the full circumstances attending its application. Safeguards built into the sentencing scheme through other provisions — and even extra-statutory procedural safeguards — may preserve the scheme's constitutional integrity. *See generally Walton*, 110 S. Ct. at 3056-58 (Part V of the opinion).

The Court found three such safeguards within Arizona law. First, the Arizona scheme provides for sentencing by a judge, not by a jury. That fact alone distinguished *Walton* from *Maynard v. Cartwright*, 486 U.S. 356 (1988), and *Godfrey v. Georgia*, 446 U.S. 420 (1980), two cases relied upon by Walton in which the Supreme Court had invalidated death sentences due to similarly vague statutory definitions of aggravating circumstances. Where a judge makes the sentencing findings there is less danger of impermissibly broad applications of statutory terms: "Trial judges are presumed to know the law and to apply it [correctly] in making their decisions." *Walton*, 110 S. Ct. 3057.

Second, the Court found, the Arizona Supreme Court had effectively salvaged the suspect provision by affording it a

3055; *compare* Ariz. Rev. Stat. Ann. § 13-703(C). Third, he alleged that the Arizona statute "creates an unconstitutional presumption that death is the proper sentence" because it *requires* the death penalty "if one or more aggravating circumstances are found and mitigating circumstances are held insufficient to call for leniency." 110 S. Ct. at 3056; *compare* Ariz. Rev. Stat. Ann. § 13-703(E). The Supreme Court rejected all three of these claims as well as the fourth, which is discussed herein.

"limiting definition" in the course of reviewing the trial judge's sentencing decision. What the state legislature had improvidently left out, the state supreme court properly inserted:

> The Arizona Supreme Court stated that "a crime is committed in an especially cruel manner when the perpetrator inflicts mental anguish or physical abuse before the victim's death," and that "[m]ental anguish includes a victim's uncertainty as to his ultimate fate." . . .
>
> * * * *
>
> Recognizing that the proper degree of definition of an aggravating factor is not susceptible of mathematical precision, we conclude that the definition given to the "especially cruel" provision *by the Arizona Supreme Court* is constitutionally sufficient because it gives meaningful guidance to the sentencer.

Id. at 3057-58 (quoting *State v. Walton*, 159 Ariz. 571, 586, 769 P.2d 1017, 1032 (1989)) (emphasis added). By injecting this limiting definition into a sentencing process already restricted to judges, Arizona provided ample protection for Walton's constitutional rights.

> If the Arizona Supreme Court has narrowed the definition of the "especially heinous, cruel or depraved" aggravating circumstance, we presume that Arizona trial judges are applying the narrower definition. It is *irrelevant* that the statute itself may not narrow the construction of the factor.

Id. at 3057 (emphasis added).

Third, the Court reasoned:

> [E]ven if a trial judge fails to apply the narrowing construction or applies an improper construction, the Constitution does not necessarily require that a state appellate court vacate a death sentence based on that factor. Rather, as we held in *Clemons v. Mississippi*, 494 U.S. _, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), a state appellate court may itself determine whether the evidence supports the existence of the aggravating circumstance as properly defined or the court may eliminate consideration of the factor altogether and determine whether any remaining aggravating circumstances are sufficient to warrant the death penalty.

Id.

In his reliance on *Walton*, Richmond points out as an initial matter that the same aggravating circumstance at issue in that case was cited by the Arizona Supreme Court in its review of his death sentence. Richmond insists that the terms of this aggravating circumstance — "especially heinous, cruel or depraved" — are facially vague. He is undeniably correct; *Walton* held so explicitly. Richmond then argues, however, that whereas the Arizona Supreme Court cured this potential defect in *Walton*, it failed to do so in his case. The court, he maintains, applied no comparable "limiting construction" in its review of his sentence. This contention is empirically incorrect.

[6] In reviewing Richmond's sentence, the Arizona Supreme Court quite clearly *did* provide a limiting construction for the admittedly vague aggravating circumstance. In fact, if anything, the state court provided a more narrowly tailored and more obviously sufficient limiting construction in Richmond's case than it did in Walton's:

> "Cruel" has been defined as "disposed to inflict pain especially in a wanton, insensate or vindictive man-

ner: sadistic." *State v. Knapp*, 114 Ariz. 531, 543, 562 P.2d 704 (1977), *cert. denied*, 435 U.S. 908, 98 S. Ct. 1458, 55 L. Ed. 2d 500 (1978). Cruelty involves the victim's pain or suffering before death. *State v. Gretzler*, [135 Ariz 42, 659 P.2d 1 (1983)]; *State v. Poland*, 132 Ariz. 269, 645 P.2d 784 (1982); *State v. Lujan*, 124 Ariz. 365, 604 P.2d 629 (1979). The offense must be committed in an *especially* cruel, heinous or depraved manner to be considered an aggravating circumstance. *State v. Lujan*, *supra*. . . .

"Heinous" has been defined as "hatefully or shockingly evil; grossly bad," and "depraved" is "marked by debasement, corruption, perversion or deterioration." *State v. Knapp*, *supra*. Heinous and depraved involve the mental state and attitude of the offender as reflected in his words and actions. *State v. Gretzler*, *supra*; *State v. Poland*, *supra*; *State v. Lujan*, *supra*. In *Gretzler*, *supra*, we discussed factors which lead to a finding of heinousness or depravity. One factor is the infliction of gratuitous violence on the victim; another related factor is the needless mutilation of the victim. Here the victim was already unconscious and bleeding when he was run over not once, but twice, each time from a different direction. The evidence indicates that the first run by the vehicle was over the victim's head crushing his skull and killing him. The second run of the vehicle was over the body of the victim. The investigating officers found, at the location of the murder, two large pools of blood separated by about 30 feet, which was consistent with the body having been run over and dragged to where it was found. . . .

. . . We believe the facts of this case set it "apart from the normal first degree murders." *State v. Brookover*, 124 Ariz. 38, 601 P.2d 1322 (1979).

Richmond, 136 Ariz. 312, 319, 666 P.2d 57, 64 (plurality opinion) (finding Crummett's killing especially heinous and depraved but not especially cruel);[9] *compare id. with Walton*, 159 Ariz. at 586-88, 769 P.2d at 1032-34.

[7] As in *Walton*, the sentence in this case was (a) imposed by a trial judge presumably knowledgeable in the law, (b) thoroughly and independently reviewed by the Arizona Supreme Court, and (c) reimposed under a sufficiently limiting construction.[10] Under a fair reading of *Walton* and the record alone, therefore, Richmond's contentions must fail.

[8] Richmond attempts to avoid this conclusion by challenging the legal accuracy of the Arizona Supreme Court's limiting construction. He cites several state court decisions, most notably *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1

[9]Richmond argues that only two of the five Justices of the Arizona Supreme Court concurred in this portion of the court's opinion. He is correct. Two other Justices voted to affirm the sentence but on other grounds. They explicitly rejected the argument that the killing had been especially heinous and depraved. *See Richmond*, 136 Ariz. 322-24, 666 P.2d at 67-69 (Cameron, J., concurring and Gordon, V.C.J., joining). The fifth Justice dissented altogether. *See* 136 Ariz. 324-26, 666 P.2d at 69-71 (Feldman, J., dissenting). The fact that a majority of the court did not concur in this finding, however, does not deny that the Justices who did concur in it provided an adequate limiting construction. The relevant point is that members of the court who premised their votes on the challenged factor undertook the deliberations and analysis constitutionally required.

More importantly, Richmond's observation is irrelevant in light of the fact that *four* Justices concurred in the finding of two other aggravating circumstances, either one of which could constitutionally have justified imposition of the death penalty. *See infra* Part IV-D.

[10]*See Richmond*, 136 Ariz. at 317, 666 P.2d at 62 ("[I]n each case where the death penalty is imposed, this court conducts an independent review of the record to assure a just result. We have reviewed the record in the instant case . . ."); 136 Ariz. at 320, 666 P.2d at 65 ("In death penalty cases, this court will conduct an independent examination of the record to determine for ourselves the presence or absence of aggravating and mitigating circumstances and the weight to give to each. We also independently determine the propriety of the sentence.").

(1983), for the proposition that the court applied a definition of the aggravating circumstance that is untenable under Arizona law. This court, however, is foreclosed from engaging in any such inquiry. A federal appellate court cannot challenge the Arizona Supreme Court on matters of Arizona law; in that realm, the authority of the state court remains supreme.

Both *Walton* and its companion case, *Lewis v. Jeffers*, 110 S. Ct. 3092 (1990), support this analysis. As *Walton* pointed out, the relevant focus for this court's attention is not upon the language of the Arizona statute per se or even upon the sentencing decision of the state trial judge; rather, it is upon the constitutional legitimacy of Richmond's sentence as that sentence stands *today* after review by and exhaustion of the state court process. *See Walton*, 110 S.-Ct. at 3057-58. The only question for this court is whether the *final* state result violates constitutional law so as to warrant granting a writ of habeas corpus. *Walton* requires this court to pay due deference to state judicial systems in the administration of their own criminal sanctions and to recognize both the competence and duty of state courts of general jurisdiction to enforce federal constitutional law.

Jeffers thoroughly reinforces the *Walton* rule. In *Jeffers*, the Supreme Court restated and reapplied the *Walton* holding to deny another Arizona prisoner's challenge to the legitimacy of his death sentence. Because *Jeffers* was before the Court on collateral review, the Court concluded that even greater deference was owed to the state system than the Court had urged in *Walton*, which it had heard on direct review. The Court never reached the merits of Jeffers's constitutional claims, and it certainly never approached any questions of state law; rather, the Court reached its decision upon formulation of the appropriate standard of review. Writing for the Court, Justice O'Connor explained:

> [R]espect for a state court's findings of fact and application of its own law counsels against the sort

> of *de novo* review undertaken by the Court of Appeals in this case. . . . Where the issue is solely whether a state court has properly found existence of a constitutionally narrowed aggravating circumstance, we have never required federal courts "to peer majestically over the [state] court's shoulder so that [they] might second-guess its interpretation of facts that quite reasonably — perhaps even quite plainly — fit within the statutory language." . . .
>
> Rather, in determining whether a state court's application of its constitutionally adequate aggravating circumstance was so erroneous as to raise an independent due process or Eighth Amendment violation, we think the more appropriate standard of review is the "rational factfinder" standard established in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). We held in *Jackson* that where a federal habeas corpus claimant alleges that his state conviction is unsupported by the evidence, federal courts must determine . . . "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Jeffers, 110 S. Ct. at 3102-03 (quoting *Godfrey v. Georgia*, 446 U.S. 420, 450 (1980) (White, J., dissenting) and *Jackson v. Virginia*, 443 U.S. 307, 319, *reh'g denied*, 444 U.S. 890 (1979)) (emphasis in original).

In short, this court's focus must not be on the underlying sentence but on whether the *state system* in both imposing and reviewing that sentence committed an *independent* constitutional violation. To vacate Richmond's sentence, this court would have to find that there is no rational basis in law or fact for the state supreme court's final evaluation that the circumstances warrant the sentence of death:

> [A] federal court should adhere to the *Jackson* standard even when reviewing the decision of a state appellate court that has independently reviewed the evidence, for the underlying question remains the same: if a State's aggravating circumstances adequately perform their constitutional function, then the state court's application of those circumstances raises, apart from due process and eighth amendment concerns, only a question of the proper application of state law. A state court's finding of an aggravating circumstance in a particular case — *including a de novo finding by an appellate court that a particular offense "is especially heinous . . . or depraved"* — is arbitrary or capricious if and only if no reasonable sentencer could have so concluded.

Id. at 3103 (emphasis added).

We therefore reject Richmond's invitation to "conduct[ ] a *de novo*, case-by-case comparison of the facts" of various state court precedents. *Id.* at 3101. Like the Supreme Court in *Walton*, we "conclude that the definition given to the 'especially cruel' provision by the Arizona Supreme Court is constitutionally sufficient." *Walton*, 110 S. Ct. at 3058. Applying *Jeffers*, we further conclude that under that definition a rational factfinder could indeed have found Crummett's murder heinous or depraved so as to warrant the penalty of death.

D

[9] Even if Richmond were to prevail in his claim that the Arizona Supreme Court failed to provide a sufficiently limiting construction for the aggravating circumstance discussed above, however, his contentions would still lack merit. The Arizona Supreme Court rested its affirmance of his sentence upon a finding of not one, but three aggravating circumstances and an insufficient showing of mitigating circumstances. *See Richmond*, 136 Ariz. at 318-21, 666 P.2d at 63-

66. The second aggravating factor relied upon was Richmond's conviction for another murder six months after his initial conviction. Although this latter conviction postdated Richmond's first, "[i]t is not disputed that the killing that was the basis of th[at] conviction occurred prior to the murder of Bernard Crummett." *Richmond*, 640 F. Supp. at 780; *see supra* note 1. In any event, both convictions were duly on record by the time of Richmond's resentencing in 1980.

Furthermore, although the state supreme court explicitly found and addressed only these two aggravating circumstances, it held that "[t]he trial court correctly found three aggravating circumstances." *Richmond*, 136 Ariz. at 320, 666 P.2d at 65. The third was an entirely separate prior conviction for kidnapping — statutorily relevant for death penalty purposes as an offense "involving the use or threat of violence on another person." Ariz. Rev. Stat. Ann. § 13-703(F)(2).[11] Arizona law explicitly provides that a single aggravating circumstance may suffice for imposition of the death penalty. *See* § 13-703(E).

Richmond does not contend, nor could he reasonably, that the statutory definitions of these two other factors are uncon-

[11] The court also hinted at the possible applicability of a fourth aggravating circumstance: the defendant's commission of the crime in expectation of pecuniary gain. *See* Ariz. Rev. Stat. Ann. § 13-703(F)(5); *Richmond*, 136 Ariz. at 320, 666 P.2d at 65. Although noting that the trial court had improperly analyzed this factor in reaching the conclusion that it did not apply, the Arizona Supreme Court declined to determine whether under a proper analysis it would apply.

With respect to consideration of Richmond's kidnapping conviction, the Arizona Supreme Court's majority opinion does not address it except to express general agreement with the trial court's reliance upon it. The concurrence, which was endorsed by two Justices, is somewhat more explicit in its embrace of the lower court's reliance on both the prior murder conviction *and* the prior kidnapping conviction. *See Richmond*, 136 Ariz. at 323-24, 666 P.2d at 68-69 (Cameron, J., concurring and Gordon, V.C.J., joining).

stitutionally vague. *See* § 13-703(F)(1)-(2). Rather, he sidesteps consideration of these additional factors by citing this circuit's en banc decision in *Adamson v. Ricketts* for the proposition that invalidation of any one aggravating circumstance requires resentencing. *See* 865 F.2d at 1037 n.42, 1038, 1039. We have just held that the aggravating circumstance to which Richmond refers is *not* invalid, but assuming for the sake of argument that it is, Richmond's reliance on *Adamson* is not well taken.

The Supreme Court granted certiorari in *Walton* specifically *because of* this circuit's en banc holding in *Adamson*,[12] and *Walton* reached the opposite conclusion regarding the Arizona statute's constitutionality. Even if the portion of *Adamson* upon which Richmond relies survives *Walton*, it still does not support his claim. Contrary to the suggestion, *Adamson* did not hold that invalidation of one aggravating circumstance automatically requires remand for resentencing; rather, the court simply noted that it is the common practice of the Arizona Supreme Court to remand for resentencing when *that court* invalidates an aggravating circumstance. *Id.* There is no suggestion in *Adamson* that the United States Constitution requires remand when one aggravating factor is eliminated from the analysis if sufficient other aggravating factors remain.

The Supreme Court's recent decision in *Clemons v. Mississippi*, 110 S. Ct. 1441 (1990), upon which Richmond also relies, is not to the contrary. In *Clemons*, a Mississippi inmate challenged the constitutionality of a death sentence imposed partially on the basis of a court's finding that it had been an

[12]*See Walton*, 110 S. Ct. at 3054 ("Because the United States Court of Appeals for the Ninth Circuit has held the Arizona death penalty statute to be unconstitutional for the reasons submitted by Walton in this case, *see Adamson v. Ricketts*, 865 F.2d 1011 (1988) (en banc), we granted certiorari."); *id.* at 3059 (Scalia, J., concurring) (describing *Adamson* and *Walton* as "essentially identical" cases).

"especially heinous, atrocious or cruel" killing. *Id.* at 1445. The Mississippi law in question permitted imposition of the death penalty upon a finding of only one aggravating circumstance so long as that aggravating circumstance outweighed all mitigating circumstances. Finding the state supreme court's consideration of the "especially heinous" factor impermissibly vague, the Supreme Court remanded for resentencing.

[10] The Court did not hold, however, that imposition of the death penalty on the basis of the single remaining aggravating factor would have been ipso facto unconstitutional. Rather, it implicitly recognized that reliance on a single aggravating factor *can* be constitutional. *See id.* at 1446, 1450-51. The Court remanded because once the vague factor was removed from the analysis, it was unclear from the Mississippi Supreme Court's opinion whether the one remaining circumstance still outweighed all the mitigating evidence. *See id.* at 1449-51 (Parts III-IV of the opinion).

[11] In this case, there is no similar doubt. Elimination of the challenged factor would still leave enough support for Richmond's sentence because the statute at issue here is fundamentally different from the statute at issue in *Clemons*. The Mississippi law that *Clemons* considered authorizes the death penalty if " 'there are insufficient mitigating circumstances . . . to *outweigh* the aggravating circumstances.' " *Id.* at 1446 n.2 (quoting Miss. Code Ann. § 99-19-101(3)(c) (Supp. 1989)) (emphasis added). Arizona's law mandates the death penalty "if the court finds *one or more* of the [enumerated] aggravating circumstances . . . *and* that there are no mitigating circumstances *sufficiently substantial to call for leniency*." Ariz. Rev. Stat. Ann. § 13-703(E) (emphasis added). The difference is significant: a conclusion by the Arizona courts that there are no substantial mitigating circumstances is separate from and independent of any conclusion regarding the existence of aggravating circumstances. Invalidation of an aggravating circumstance does not mandate reweighing or require

resentencing where the court has found that the prosecution has met its burden of establishing aggravation sufficient to warrant the state's harshest penalty *two or three times* and that the defense has failed to establish mitigating circumstances sufficiently substantial to call for leniency. *See id.* §§ 13-703(C), (E). Under the statute at issue in *Clemons*, the invalidation of an aggravating circumstance necessarily renders any evidence of mitigation "weightier" or more substantial in a relative sense; the same, however, cannot be said under the terms of the Arizona statute at issue here. Nothing in the Arizona statute suggests the need for plenary reweighing where the record still reveals that there are "one or more of the [enumerated] aggravating circumstances . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency." *Id.* § 13-703(E).

V

Richmond next contends that because the trial court never specifically found that he caused, intended to cause, or attempted to cause Crummett's death, imposition of the death penalty would violate the rule of *Enmund v. Florida*, 458 U.S. 782 (1982). The defendant in *Enmund* had been convicted of felony murder and sentenced to death for his involvement in the killing of two robbery victims, even though the record only suggested that he was the driver of the get-away car. In vacating Enmund's sentence, the Supreme Court held that imposition of the death penalty violates the eighth and fourteenth amendments in the absence of a specific finding by the trier of fact that the defendant actually killed, attempted to kill, intended to kill, or contemplated that life would be taken:

> Enmund himself did not kill or attempt to kill; and, as construed by the Florida Supreme Court, the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder. Yet under Florida law death was an authorized penalty because Enmund aided

> and abetted a robbery in the course of which murder was committed.

Id. at 798; *see id.* at 801.

Enmund, however, is clearly distinguishable from the present case. The jury that convicted Richmond received instructions on both premeditated and felony murder, and the record before us clearly provides sufficient evidence for a finding that Richmond expressly intended to participate in and to facilitate that murder. Moreover, the Supreme Court's holding in *Enmund* was predicated upon the attenuated nature of the defendant's responsibility for the deaths in that case. As the Supreme Court pointed out more recently in *Tison v. Arizona*, 481 U.S. 137, *reh'g denied*, 482 U.S. 921 (1987), *Enmund* does not stand for the blanket proposition that capital punishment is unconstitutional in cases of felony murder:

> [S]ome nonintentional murderers may be among the most dangerous and inhumane of all — the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill." . . . [W]e hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.
>
> • • • •

> . . . [W]e simply hold that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement.

481 U.S. at 157-58 (footnote omitted).

Furthermore, in its independent review of the record in this case, the Arizona Supreme Court explicitly did consider *Enmund*, and it set forth findings sufficient to satisfy both that test and the Supreme Court's later pronouncements in *Tison*:

> Even if we accept appellant's contention that he was not driving the car when the victim was run over, we do not believe this case falls within the parameters of *Enmund*. The facts from the appellant's version indicate that he was the leader of the group; he was the first to use violent force on the victim; he was aware that the victim, if allowed to live, could identify him. Appellant, from his version of the facts, was willing to leave the wounded and unconscious victim alone in the desert to an uncertain fate. . . . There is no evidence that appellant protested or showed any emotion when the victim was twice run over. The appellant's version of the facts indicates appellant played an integral part in the events which caused the victim's death, and he willingly assisted in the acts which were intended to cause the victim's death.
>
> The evidence presented by the state was that the appellant drove the vehicle over the victim, thus killing him. The testimony of Faith Erwin was that the appellant was the driver at the time the victim was run over. The circumstantial evidence supports Faith's testimony.

Richmond, 136 Ariz. at 318, 666 P.2d at 63.[13]

[12] Nor does it matter that the *Enmund* finding was made by the state supreme court rather than by the original sentencing court:

> At what precise point in its criminal process a State chooses to make the *Enmund* determination is of little concern from the standpoint of the Constitution. . . .
>
> . . . [W]hen a federal habeas court reviews a claim that the death penalty has been imposed on one who has neither killed, attempted to kill, nor intended that a killing take place or lethal force be used, the court's inquiry cannot be limited to an examination of jury instructions. Rather, the court must examine the entire course of the state-court proceedings against the defendant in order to determine whether, at some point in the process, the requisite factual finding as to the defendant's culpability has been made.

Cabana v. Bullock, 474 U.S. 376, 386-87 (1986) (footnote omitted). Accordingly, we conclude that the Arizona courts have predicated Richmond's sentence upon a sufficient finding of criminal intent.

VI

[13] As a black male of moderate means, Richmond next contends that the district court erred in denying his request for

[13]Interestingly, the Arizona Supreme Court conducted its *Enmund* analysis in this case before the United States Supreme Court narrowed the *Enmund* holding in *Tison*. The United States Supreme Court decided *Enmund* in 1982; the Arizona Supreme Court affirmed Richmond's sentence in 1983; and the United States Supreme Court decided *Tison* in 1987.

an evidentiary hearing upon his claim that Arizona's administration of the death penalty is racially, sexually, and socio-economically discriminatory. We disagree. A habeas corpus petitioner is entitled to an evidentiary hearing both if he "alleges facts which, if proved, would entitle him to relief" and if he did not receive a full and fair evidentiary hearing on the issue in the state court. *Townsend v. Sain*, 372 U.S. 293, 312 (1963); *see id.* at 312-19. The facts that Richmond has alleged, even if proven, would not entitle him to relief.

In support of his request for a hearing on this issue in the district court, Richmond made an extensive proffer of what he seeks to prove:

> The proffer included that, although 15% of the victims of homicides in Arizona since 1973 have been black, every person under death sentence was convicted of killing a white victim; that [although] approximately 10% of the persons convicted of homicide in Arizona since 1973 have been women, no women are on death row. All three experts who had examined the Arizona death sentencing process from 1973 to the present [March 1987] found significant discrepancies based on the victim's race; two found evidence of discrimination based on the defendant's race, and one demonstrated significant disparities based on sex and economic status as well.

Brief for Appellant at 38-39 (citations omitted). This proffered evidence, however, is precisely the sort of generalized statistical evidence that was rejected as unactionable by the Supreme Court in *McKleskey v. Kemp*, 481 U.S. 279, *reh'g denied*, 482 U.S. 920 (1987). Even if proven, the statistical disparities to which Richmond points would be insufficient to support an inference of purposeful discrimination in his own case. To require the district court to weigh this evidence would be to suggest that Richmond's death sentence could conceivably be invalidated solely on the basis of his physical

or social affinity to other defendants who are not now before this court but who may have suffered unconstitutional discrimination in their receipt of the same sentence. This we cannot do. To prevail in challenging his sentence under the equal protection clause, Richmond "must prove that the decision-makers in *his* case acted with discriminatory purpose." *McKleskey*, 481 U.S. at 292 (emphasis in original). Richmond has alleged no facts to suggest that either the Arizona Supreme Court, the state trial court, or the prosecutor's office acted with prejudicial or discriminatory purpose in either seeking or imposing his sentence. The district court thus properly denied his request for an evidentiary hearing on this issue. *See generally id.* at 292-320.

VII

[14] Richmond's final contention is that fulfillment of his sentence after sixteen years on death row would constitute cruel and unusual punishment in violation of the eighth and fourteenth amendments.[14] We know of no decision by either the United States Supreme Court or this circuit that has held that the accumulation of time a defendant spends on death row during the prosecution of his appeals can accrue into an independent constitutional violation, and Richmond has cited no such decision.

On the other hand, the State of Arizona has directed the court's attention to two relevant, though not controlling, precedents. In a decision affirmed two years later by the Tenth Circuit, the United States District Court for the District of

[14]Richmond actually alleged that fulfillment of his sentence after *thirteen* years on death row would constitute cruel and unusual punishment. Because he raised that claim in his opening brief, which was filed in 1987, we have added the past three years during which we deferred submission of his appeal. We note, however, that because this appeal properly concerns Richmond's sentence only as of the date of its reimposition in 1980, the relevant period of his residency on death row is actually ten years.

Utah rejected a similar claim brought by a habeas corpus petitioner who had been on death row for ten years. *Andrews v. Shulsen*, 600 F. Supp. 408, 431 (D. Utah 1984), *aff'd*. 802 F.2d 1256 (10th Cir. 1986), *cert. denied*, 485 U.S. 919, *reh'g denied*, 485 U.S. 1015 (1988). The court reasoned that to accept the petitioner's argument would be "a mockery of justice" given that the delay was attributable more to the petitioner's actions than to the state's. *Id.* Like Richmond, the petitioner in *Andrews* had sought "extensive and repeated review of [his] death sentence." *Id.* Arizona also points to the well-known decision of the California Supreme Court in *People v. Chessman*, in which that court rejected the same claim by an eleven-year death-row inmate. 52 Cal. 2d 467, _, 341 P.2d 679, 699 (1959), *cert. denied*, 361 U.S. 925, *reh'g denied*, 361 U.S. 941 (1960). Finally, we note the decision of the United States Supreme Court in *Harrison v. United States*, 392 U.S. 219, 221 n.4 (1968), which the district court cited in its rejection of this claim and which held that an eight-year delay between an arrest and sentencing was not unconstitutional where the delay resulted from the need to assure careful review of an unusually complex case. *See Richmond*, 640 F. Supp. at 803 (citing *Harrison*).

Especially in light of the relative absence of contrary precedents, we believe that the reasoning of these cases is sound. A defendant must not be penalized for pursuing his constitutional rights, but he also should not be able to benefit from the ultimately unsuccessful pursuit of those rights. It would indeed be a mockery of justice if the delay incurred during the prosecution of claims that fail on the merits could itself accrue into a substantive claim to the very relief that had been sought and properly denied in the first place. If that were the law, death-row inmates would be able to avoid their sentences simply by delaying proceedings beyond some threshold amount of time, while other death-row inmates — less successful in their attempts to delay — would be forced to face their sentences. Such differential treatment would be far more "arbitrary and unfair" and "cruel and unusual" than the current system of fulfilling sentences when the last in the line of appeals fails on the merits. We thus decline to recognize Richmond's lengthy incarceration on death row during the pendency of his appeals as substantively and independently violative of the Constitution.

VIII

For the foregoing reasons, we affirm the judgment of the district court and deny Richmond's petition for a writ of habeas corpus.

AFFIRMED.

HARRY PREGERSON, Circuit Judge, with whom JUDGES HUG, NORRIS and REINHARDT join, dissenting from denial of rehearing en banc:

By declining to rehear this case en banc, this court sends a man to his death without undertaking even the minimal review that the Supreme Court continues to find appropriate in habeas cases. In this case, even the most deferential review of the record reveals that no rational sentencer could have concluded that Richmond's mental state was "especially heinous," as that term is defined by the Arizona Supreme Court. The Arizona Supreme Court's conclusion that Richmond's mental state was "especially heinous" turns on the assumption that he was driving the car when it ran over the victim. The identity of the driver, however, was the subject of a credibility dispute. Neither the jury nor the trial court resolved that dispute, and the Arizona Supreme Court is incapable of resolving it rationally.

Moreover, the panel maintains that any error in the finding of an aggravating circumstance is harmless because the sentencing judge concluded that the mitigating circumstances

were not sufficiently substantial to call for leniency. The panel's conclusion is based on the erroneous premise that Arizona law permitted the sentencing court to arrive at such a conclusion without weighing the aggravating factors against the mitigating circumstances. *See Richmond v. Lewis*, 921 F.2d 933, 947 (9th Cir. 1990). By maintaining that Arizona's statute is not a weighing statute, the panel's opinion directly conflicts with Arizona case law and the prior decisions of this court. That case law demonstrates that in Arizona, the sentencer evaluates whether the mitigating evidence is sufficiently substantial to warrant leniency by weighing it against the aggravating factors. When an invalid aggravating factor is removed from the scales, the equation can change. Someone must reevaluate the mix of mitigating factors in light of the reduced gravity of the remaining valid aggravating factors.

I

The panel's opinion acknowledges that the "especially heinous" aggravating circumstance is unconstitutionally vague on its face, but it concludes that the Arizona Supreme Court applied a sufficiently narrow construction of the facially vague term. Once a state appellate court has articulated a constitutionally sufficient narrowing construction of a facially vague aggravating circumstance, federal courts must still review the state courts' application of that narrowed definition to the facts of a particular case. That review is to be conducted under the deferential "rational factfinder" standard of *Jackson v. Virginia*, 443 U.S. 307 (1979). A state court's finding of an aggravating circumstance, including a state appellate court's finding that a murder is "especially heinous," violates the Constitution if no reasonable sentencer could have made the finding. *See Lewis v. Jeffers*, 110 S. Ct. 3092, 3102-03 (1990).

In this case, no rational sentencer could have found that Richmond's mental state was "especially heinous" as that facially vague term has been narrowed by the Arizona

Supreme Court. The limiting definition, as reported in the panel's opinion, requires that the sentencer make a factual finding about the defendant's mental state. "Heinous and depraved involve the mental state and attitude of the offender as reflected in his words and actions." *State v. Richmond*, 666 P.2d 57, 64 (Ariz. 1983), *quoted in Richmond v. Lewis*, 921 F.2d 933, 943 (9th Cir. 1990). In addition, the Arizona Supreme Court tells us that "heinous" means "grossly bad" or "shockingly evil." The Arizona Supreme Court applies several factors to determine whether the "especially heinous" aggravating circumstance applies. In determining in this case that Richmond's mental state was grossly bad or shockingly evil, the Arizona Supreme Court mentioned only two of those factors: the infliction of gratuitous violence on the victim and the mutilation of the corpse. I believe that by focusing solely on those two factors in this case, the Arizona Supreme Court could draw rational inferences about the mental state of only one actor: the driver of the car:

> Here the victim was already unconscious and bleeding when he was run over not once, but twice, each time from a different direction. The evidence indicates that the first run by the vehicle was over the victim's head crushing his skull and killing him. The second run of the vehicle was over the body of the victim. The investigating officers found, at the location of the murder, two large pools of blood separated by about 30 feet, which was consistent with the body having been run over and dragged to where it was found.

Id., quoted in *Richmond*, 921 F.2d at 943.

As this quotation demonstrates, the Arizona Supreme Court clearly focused on the actions of the driver when it determined that the facts warranted a finding that the killer's mental state was "especially heinous." The Arizona Supreme Court appeared to assume that Richmond was the driver. Yet

neither the jury nor the sentencing court ever found that Richmond was the driver.

Indeed, the driver's identity has been vigorously disputed throughout this case. Faith Erwin provided the only testimony implicating Richmond as the fatal driver.[1] Richmond has always denied being the fatal driver, and he has witnesses to support him. In his statement to the police, Richmond said that Becky Corella backed the car up over the victim, then drove forward and ran over him again. *Richmond v. Ricketts*, 640 F. Supp. 767, 771 (D. Ariz. 1986). Corella did not testify.[2] A witness for Richmond testified that Erwin earlier reported that Corella had been driving. 640 F. Supp. at 778. The jury did not determine who drove the car. Because the jury was instructed on felony murder, the jury's verdict is consistent with either version.

At the sentencing hearing, Richmond submitted additional evidence to show that Corella was the lethal driver. 640 F. Supp. at 778-79. According to affidavits signed by two witnesses, Corella admitted being the driver. Moreover, an affidavit signed by the prosecutor in the original trial stated that Corella was prepared to testify "and accept blame for the killing." *Id.*[3]

Neither the jury, the sentencing court, nor the Arizona Supreme Court has expressly resolved the dispute over who drove the car over the victim's body. Yet the Arizona Supreme Court's conclusion that Richmond's mental state

[1]Erwin received immunity in return for her testimony. *Richmond v. Ricketts*, 640 F. Supp. 767, 792 n.30 (D. Ariz. 1986).

[2]Corella was granted immunity, but neither the prosecution nor the defense called her as a witness. *State v. Richmond*, 560 P.2d 41, 44 (Ariz. 1976).

[3]In discussing the procedural history of the case, the panel's opinion mentions that Richmond filed one of these affidavits in a petition for post-conviction relief. 921 F.2d at 936. It does not discuss the other affidavits.

was "especially heinous" turns on the tacit assumption that he was the driver.

Just as the jury's verdict did not necessarily determine that Richmond was the driver, the trial court's finding that the murder was "especially cruel or heinous" did not turn on any finding that Richmond was the driver. Nor did it turn on any conclusion about Richmond's mental state. At the time Richmond was sentenced in 1980, the Arizona Supreme Court had not yet narrowed the definition of "especially heinous" to restrict the application of that aggravating circumstance to determinations of the defendant's mental state or attitude. The sentencing court did not explain why it concluded that the aggravating circumstance applied, nor did it assume that Richmond was driving the car when the victim was run over. The findings and special verdict of the sentencing court do not even discuss the identity of the driver.

Nevertheless, the identity of the driver was an issue on appeal to the Arizona Supreme Court. While Richmond's case was on appeal, the United States Supreme Court decided *Edmund v. Florida*, 458 U.S. 782 (1982), which held that the Constitution forbids capital punishment for certain types of felony murder convictions. In *Edmund*, the Court determined that states cannot execute defendants convicted of felony murder unless they actually killed, attempted to kill, or intended that a killing occur. *See Cabana v. Bullock*, 474 U.S. 376, 378 (1986). Richmond contended that the ruling of *Edmund* should spare him from execution.

The Arizona Supreme Court's discussion of the *Edmund* argument is the only section of the state supreme court opinion that discusses the dispute over the driver's identity. As I read the opinion of the state supreme court, it determined that Richmond's *Edmund* argument was a loser no matter who drove the car. Even under Richmond's version of the facts, the court noted, Richmond's level of involvement in the crime was substantial enough that it satisfied *Edmund*, without

regard to whether Richmond was responsible for the final lethal action. *See State v. Richmond*, 666 P.2d at 63.

Although the Arizona Supreme Court discussed the dispute over the identity of the driver, the Arizona courts resolved the *Edmund* question without determining whether or not Richmond drove the car. The Arizona Supreme Court was institutionally incapable of resolving the credibility dispute over the identity of the driver. *See Cabana v. Bullock*, 474 U.S. 376, 388 n.5 (1986). Conceivably, the Arizona Supreme Court could have determined that the sentencing court actually made an *Edmund* finding, and could have further determined that such a finding was supported by the evidence. The record, however, shows that the sentencing court made no *Edmund* finding, nor did it determine whether Richmond or Corella drove the car over the victim.* The opinion of the panel confirms that it was the state supreme court, not the sentencing court, that resolved the *Edmund* question. *See Richmond* 921 F.2d at 948 ("Nor does it matter that the *Edmund* finding was made by the state supreme court rather than by the original sentencing court").

In sum, although the sentencing court may have been capable of resolving the dispute over the identity of the driver, it did not do so. The factfinder in this case can only be the Arizona Supreme Court. Yet the Arizona Supreme Court could

*The opinion of the Arizona Supreme Court includes one sentence that suggests that the sentencing court resolved the credibility conflict and made a factual finding that Richmond drove the car. The court said that "the trial judge was justified in concluding that appellant drove the vehicle that was used to kill the victim." *State v. Richmond*, 666 P.2d 57, 63 (Ariz. 1983). This sentence suggests that the Arizona Supreme Court believed that the trial court made a finding about the driver's identity. If so, then the court was mistaken. There is simply nothing in the record to suggest that the trial judge made *any* conclusion about whether Richmond or Corella drove the car. If any state court can be said to have determined the identity of the driver, it is the Arizona Supreme Court, not the sentencing court. Yet the Arizona Supreme Court could not rationally determine whether it was Richmond or Erwin who was telling the truth.

not rationally resolve this factual dispute on the basis of a cold record. *See Cabana*, 474 U.S. at 388 n.5. Nevertheless, the Arizona Supreme Court's conclusion that Richmond's mental state was "especially heinous" depends on the assumption that Richmond, not Corella, deliberately drove the car over the victim's body. Applying the deferential standard articulated by the Supreme Court, I do not see how, under these circumstances, any rational factfinder could conclude that the "especially heinous" aggravating circumstance, as narrowed and defined by the Arizona Supreme Court, applied in this case.

II

Richmond was sentenced to death on the basis of three aggravating factors. Because Richmond does not challenge the application of two of those aggravating factors, the panel asserts in part IV.D. of its opinion that any error in applying the "especially heinous" aggravating circumstance is harmless. I strongly disagree. In Richmond's case, the trial court arrived at a verdict of death only after weighing the mitigating evidence against the aggravating factors. Because the ultimate sentencing determination in Arizona involves a balancing of the mitigating evidence against the aggravating factors, Arizona is a "weighing" state, as the Supreme Court used that term in *Clemons v. Mississippi*, 110 S. Ct. 1441, 1446, 1450 (1990). If the sentencing court's balancing included a constitutionally invalid aggravating factor, the fact that the scales also contained a valid aggravating factor does not, as the panel believes, dispose of Richmond's claim. In weighing states, the rule of *Lockett v. Ohio*, 438 U.S. 586 (1978), forbids such an "automatic rule of affirmance," because "it would not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." *Clemons*, 110 S. Ct. at 1450. There must either be a resentencing, *see Creech v. Arave*, 928 F.2d 1481, 1489 (9th Cir. 1991); *Adamson v. Ricketts*, 865 F.2d 1011, 1038-39 (9th Cir. 1988) (en banc),

or at a minimum, the Arizona courts must reweigh the defendant's mitigating evidence against the valid aggravating factors.

In expounding its view that any error in the finding of the "especially heinous" aggravating circumstance was harmless, the panel begins with the erroneous premise, which it advances without citing any case law, that Arizona is not a weighing state. *See Richmond*, 921 F.2d at 947. That premise is simply wrong. The language of the Arizona statute, as well as the cases of this court and the Arizona Supreme Court, establish that Arizona is indeed a weighing state.

It appears that the panel misreads Arizona law simply because the statute's text does not include the word "weigh." Nevertheless, it is clear that the statute requires weighing. If the trial court finds any aggravating circumstances, it must then make findings on the existence of mitigating circumstances. It is only after the trial court has made findings on the existence of both that it must make the sentencing decision. The statute requires a sentence of death if there are any aggravating circumstances "and there are no mitigating circumstances sufficiently substantial to call for leniency." Ariz. Rev. Stat. § 13-703(E).

Without citing any authority, the panel mistakenly concludes that the aggravating circumstances do not influence the Arizona sentencer's inquiry into whether the mitigating circumstances are sufficiently substantial. 921 F.2d at 947. On the contrary, it is clear that the trial judge determines whether the mitigating circumstances are "sufficiently substantial" by evaluating them in relation to the aggravating circumstances that exist. This is a balancing, a process of weighing.

Numerous cases of the Arizona Supreme Court confirm that the sentencer determines whether mitigating evidence is "sufficiently substantial" by weighing it against aggravating circumstances. *See, e.g., State v. Rossi*, 706 P.2d 371, 379

(Ariz. 1985) ("Once the trial judge finds that defendant's capacity was significantly impaired . . . a mitigating factor arises which is then weighed against any aggravating circumstances that the trial judge may find to determine whether mitigating factors are sufficiently substantial to call for leniency"); *State v. Harding*, 670 P.2d 383, 397 (Ariz. 1983) ("We have described the formula of 'sufficiently substantial to call for leniency' as involving the weighing of aggravating against mitigating circumstances on the basis of the gravity of each circumstance."); *State v. Gretzler*, 659 P.2d 1, 13 (Ariz. 1983) (determining whether mitigating circumstances are sufficiently substantial involves weighing and balancing of aggravating and mitigating circumstances that are present). The Arizona Supreme Court has clearly explained that determining whether mitigating circumstances exist is distinct from the final balancing test:

> [T]he trial court acts first as the fact finder. It must consider whether the state has proven any of the aggravating factors .... It must also determine whether the defendant has shown mitigating circumstances .... After the trial court has made these findings of fact, it then engages in a balancing test in which it determines whether the mitigating factors are sufficiently substantial to call for leniency.

State v. Leslie, 708 P.2d 719, 730 (Ariz. 1985), *quoted in Adamson v. Ricketts*, 865 F.2d 1011, 1063 (9th Cir. 1988) (en banc) (Brunetti, J., dissenting). The Arizona case law thus confirms that the panel in this case has misconstrued the operation of the Arizona statute.

The panel has not simply misinterpreted Arizona law; it has also overlooked our prior cases. Although some portions of our opinion in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) (en banc), have not survived as good law, our description of the Arizona statute remains valid. We explained that after the parties have established the existence of aggravating

and mitigating circumstances, "the court must weigh the aggravating circumstance(s) against the mitigating circumstance(s)." *Id.* at 1040; *see also id.* at 1065-66 (Brunetti, J., dissenting). In *Adamson*, the State of Arizona itself acknowledged that the statute requires the sentencer to balance. *See id.* at 1043.[5]

In Richmond's case, the trial court found that there were a number of mitigating circumstances. *See State v. Richmond*, 666 P.2d 57, 65 (Ariz. 1983). It was only by comparing them to the aggravating circumstances that the sentencer concluded that they were not sufficiently substantial to warrant leniency. If a reviewing court's analysis reduces the number of valid aggravating circumstances, it reduces the weight and gravity of the aggravating factors that the sentencer may permissibly consider. The reviewing court can no longer rely on an earlier finding that the mitigating circumstances were not sufficiently substantial to call for leniency. A new balancing must be conducted in order to determine whether the mitigating circumstances are sufficiently substantial in relation to the remaining valid aggravating factors.

The panel fails to recognize that the findings of no mitigating circumstances sufficiently substantial to call for leniency is simply the end result of the balancing or weighing that the Arizona statute requires. It is not an isolated finding of fact. It depends on the nature and gravity of the aggravating circumstances. If the sentencing court weighed the mitigating circumstances against both valid and invalid aggravating circumstances, then the sentence of death cannot stand. At a minimum, there would have to be a determination whether the

[5]The panel's opinion also conflicts with our previous reading of the virtually identical language of Montana's capital sentencing statute. In Montana, as well as Arizona, the sentencer determines whether mitigating evidence is sufficiently substantial to warrant leniency by viewing it in relation to the aggravating circumstances that have been established. *See Smith v. McCormick*, 914 F.2d 1153 (9th Cir. 1990).

mitigating circumstances, when weighed against the remaining valid aggravating circumstances, were sufficiently substantial to call for leniency.

III

Because no rational sentencer could have found that the "especially heinous" aggravating factor applied, Richmond is entitled to further proceedings in the state courts. Richmond presented a considerable amount of mitigating evidence at his sentencing hearing. Indeed, one justice of the Arizona Supreme Court would have reversed the sentence of death on the strength of the mitigating evidence. *See Richmond*, 666 P.2d at 69 (Feldman, J., dissenting). Richmond is entitled to have the Arizona courts reevaluate the strength of that mitigating evidence in relation to the valid aggravating factors, with the invalid "especially heinous" factor removed from the scales.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIE LEE RICHMOND, *Petitioner-Appellant,* v. SAMUEL A. LEWIS,* Director, Arizona Department of Corrections; and ROGER CRIST, Superintendent of the Arizona State Prison, *Respondents-Appellees.*	No. 86-2382 D.C. No. CV-84-010-T-ACM ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Arizona
Alfredo C. Marquez, District Judge, Presiding

Argued and Submitted September 18, 1987
Submission Vacated September 22, 1987
Reargued and Submitted September 27, 1990
San Francisco, California

Filed December 26, 1990
Amended October 17, 1991

Before: Arthur L. Alarcon and Diarmuid F. O'Scannlain,
Circuit Judges, and Albert Lee Stephens,** District Judge.

Opinion by Judge O'Scannlain; Dissent by Judge Pregerson,
with whom Judges Hug, Norris and Reinhardt join.

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*Samuel A. Lewis and Roger Crist have been substituted for their respective predecessors in office, James R. Ricketts and Donald Wawrzaszek, pursuant to Federal Rule of Appellate Procedure 43(c)(1).

**The Honorable Albert Lee Stephens, United States District Judge for the Central District of California, sitting by designation.

the Arizona courts predicated Richmond's sentence upon a sufficient finding of criminal intent. **[13]** The court also disagreed that Arizona's administration of the death penalty was racially, sexually, and socio-economically discriminatory. The facts that Richmond alleged in support of this contention, even if proven, did not entitle him to relief. **[14]** The court rejected Richmond's final contention that fulfillment of his sentence after sixteen years on death row was cruel and unusual punishment. The court knew of no decision, and Richmond cited none, that the accumulation of time a defendant spends on death row during the prosecution of his appeals could accrue into an independent constitutional violation.

COUNSEL

Timothy K. Ford, MacDonald, Hoague & Bayless, Seattle, Washington, for the petitioner-appellant.

Jack Roberts, Assistant Attorney General, Phoenix, Arizona, for the respondents-appellees.

ORDER

The opinion reported at 921 F.2d 933 (9th Cir. 1990) is hereby amended as follows: in the block quotation in the second column on page 943 of the opinion, twenty-two lines from the bottom of the page, delete the ellipsis and insert in lieu thereof: "In *Gretzler, supra*, we discussed factors which lead to a finding of heinousness or depravity. One factor is the infliction of gratuitous violence on the victim; another related factor is the needless mutilation of the victim."

The final paragraph in Part IV-D on page 947 of the opinion is hereby amended to read as follows:

In this case, there is no similar doubt. Elimination of the challenged factor would still leave enough support for Richmond's sentence because the statute at issue here is fundamentally different from the statute at issue in *Clemons*. The Mississippi law that *Clemons* considered authorizes the death penalty if " 'there are insufficient mitigating circumstances . . . to *outweigh* the aggravating circumstances.' " *Id.* at 1446 n.2 (quoting Miss. Code Ann. § 99-19-101(3)(c) (Supp. 1989)) (emphasis added). Arizona's law mandates the death penalty "if the court finds *one or more* of the [enumerated] aggravating circumstances . . . *and* that there are no mitigating circumstances *sufficiently substantial to call for leniency.*" Ariz. Rev. Stat. Ann. § 13-703(E) (emphasis added). The difference is significant: a conclusion by the Arizona courts that there are no substantial mitigating circumstances is separate from and independent of any conclusion regarding the existence of aggravating circumstances. Invalidation of an aggravating circumstance does not mandate reweighing or require resentencing where the court has found that the prosecution has met its burden of establishing aggravation sufficient to warrant the state's harshest penalty *two or three times* and that the defense has failed to establish mitigating circumstances sufficiently substantial to call for leniency. *See id.* §§ 13-703(C), (E). Under the statute at issue in *Clemons*, the invalidation of an aggravating circumstance necessarily renders any evidence of mitigation "weightier" or more substantial in a relative sense; the same, however, cannot be said under the terms of the Arizona statute at issue here. Nothing in the Arizona statute suggests the need for plenary reweighing where the record still reveals that there are "one or more of the [enumerated] aggravating circumstances . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency." *Id.* § 13-703(E).

The panel has voted to deny the petition for rehearing. Judges Alarcon and O'Scannlain have voted to reject the suggestion for rehearing en banc and Judge Stephens so recommends.

On the request of a judge in regular active service, the suggestion for rehearing en banc was put to a vote of the full court, and the majority of the court voted to deny rehearing. Fed. R. App. P. 35(b). Judge Pregerson dissented from the denial of rehearing and was joined by Judges Hug and Reinhardt. The dissent is filed as an attachment to this order.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX C

APPENDIX C

victed of murder, to death, and defendant appealed. The Supreme Court, Holohan, C.J., held that: (1) information charging defendant with first-degree murder gave adequate notice of charges against him; (2) right to speedy trial did not apply to sentencing; (3) defendant was not prejudiced by six-year delay in sentencing; (4) defendant failed to show that sentencing judge entertained actual bias or prejudice against him; (5) evidence was sufficient to support finding that defendant intentionally killed victim; (6) trial court properly considered prior murder conviction to be aggravating circumstance; (7) trial court properly considered evidence of defendant's good character as mitigating circumstance, but found it unpersuasive; (8) mitigation offered by defendant was not sufficiently substantial to outweigh aggravating circumstances warranting imposition of death penalty; (9) death penalty was not excessive or disproportionate to penalty imposed in similar cases; and (10) death penalty statute, on its face and in application, is constitutional.

Affirmed.

Cameron, J., specially concurred with opinion in which Gordon, V.C.J., concurred.

Feldman, J., dissented with opinion.

136 Ariz. 312

STATE of Arizona, Appellee,

v.

Willie Lee RICHMOND, Appellant.

No. 2914.

Supreme Court of Arizona,
En Banc.

May 12, 1983.

Rehearing Denied June 28, 1983.

After remand for resentencing, 114 Ariz. 186, 560 P.2d 41, the Superior Court, Pima County, Cause No. A-24252, Richard N. Roylston, J., sentenced defendant, con-

1. Constitutional Law ⇐265

Due process requires that defendant be advised of specific charges against him; however, there is no requirement that defendant be advised in indictment or information of statutory penalty, or that he be advised what aggravating circumstances will be presented at sentencing in event of conviction. U.S.C.A. Const.Amend. 14.

2. Indictment and Information ⇐71.4(5)

Information charging first-degree murder gave defendant adequate notice of charges against him, and thus satisfied Sixth Amendment right to know nature and cause of accusation. U.S.C.A. Const.

Amend. 6; A.R.S. §§ 13–451 to 13–453 (Repealed).

3. Criminal Law ⇐996(2)

Six-year delay in resentencing of defendant did not deprive defendant of constitutional right to speedy trial, in that right to speedy trial does not extend to sentencing. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇐1177

Defendant was not prejudiced by six-year delay in resentencing where such delay resulted in defendant having opportunity to present additional evidence as negation of sentence, and sentence he received at resentencing was no harsher than original sentence.

5. Constitutional Law ⇐70.1(10), 203, 270(1)
Criminal Law ⇐189

Resentencing of defendant was not violation of ex post facto prohibitions, double jeopardy prohibitions, nor of due process and separation of powers requirements. U.S.C.A. Const. Art. 1, §§ 9, cl. 3, 10, cl. 1; Amends. 5, 14.

6. Jury ⇐24

Trial court's resentencing of defendant did not deny defendant his alleged constitutional right to have jury decide presence of aggravating or mitigating circumstances.

7. Constitutional Law ⇐270(1)

Once defendant has been found guilty beyond a reasonable doubt, due process is not offended by requiring defendant to establish mitigating circumstances, as facts which would tend to show mitigation are peculiarly within knowledge of defendant. U.S.C.A. Const.Amend. 14.

8. Judges ⇐47(2)

A litigant is entitled to impartial judge at any stage of proceedings; however, this does not include a judge totally ignorant of previous proceedings.

9. Constitutional Law ⇐270(1)
Criminal Law ⇐1165(1)

Where defendant who was resentenced presented no evidence that sentencing judge entertained actual bias or prejudice against him, defendant failed to show prejudice or deprivation of due process. U.S.C.A. Const.Amend. 14.

10. Criminal Law ⇐1134(8)

In each case where death penalty is imposed, Supreme Court will conduct independent review of record to assure just result.

11. Homicide ⇐230

In first-degree murder prosecution, evidence that defendant played integral parts in events which caused victim's death, willingly assisted in acts which were intended to cause victim's death, and that he drove vehicle that was used to kill victim was sufficient to support finding that defendant intended to take a life. A.R.S. §§ 13–451 to 13–453 (Repealed).

12. Homicide ⇐354

In sentencing defendant convicted of murder, trial court did not err in finding prior murder conviction to be aggravating circumstance, even though defendant was convicted of prior murder subsequent to conviction in instant case. A.R.S. § 13–703, subd. F, par. 1.

13. Criminal Law ⇐1208(6)

For purposes of applying statute making commission of offense in especially heinous, cruel or depraved manner an aggravating circumstance, in first-degree murder prosecution, "cruelty" involves victim's pain or suffering before death. A.R.S. § 13–703, subd. F, par. 6; §§ 13–451 to 13–453 (Repealed).

See publication Words and Phrases for other judicial constructions and definitions.

14. Homicide ⇐354

In first-degree murder prosecution, there was no evidence to indicate that victim suffered more pain than that of initial blow which rendered him unconscious, and thus, offense was not committed in cruel manner, for purposes of statute making it aggravating circumstance to commit offense in especially heinous, cruel or depraved manner. A.R.S. § 13–703, subd. F, par. 6; §§ 13–451 to 13–453 (Repealed).

15. **Homicide** ⇐354

As used in statute making it aggravating circumstance to commit offense in especially heinous, cruel or depraved manner, "heinous" and "depraved" involve mental state and attitude of offender as reflected in his words and actions; factors to be considered include infliction of gratuitous violence on victim, and needless mutilation of victim. A.R.S. § 13–703, subd. F, par. 6.

See publication Words and Phrases for other judicial constructions and definitions.

16. **Criminal Law** ⇐1208(6)

Presence of any one of elements of cruelty, heinousness, or depravity is sufficient to constitute aggravating circumstance under statute making it aggravating circumstance to commit offense in especially heinous, cruel or depraved manner. A.R.S. § 13–703, subd. F, par. 6.

17. **Homicide** ⇐354

In resentencing defendant, convicted of first-degree murder, trial court did not err in failing to find his improved conduct and character to be mitigating circumstance; though it would have been arbitrary decision had court refused to consider the evidence, it was sufficient that court did consider the evidence but found it unpersuasive. A.R.S. §§ 13–451 to 13–453 (Repealed).

18. **Criminal Law** ⇐1134(8)

In death penalty cases, Supreme Court will conduct independent examination of record to determine for itself the presence or absence of aggravating and mitigating circumstances and weight to give to each, and will independently determine propriety of the sentence. A.R.S. § 13–703.

19. **Homicide** ⇐354

In resentencing defendant, convicted of first-degree murder, trial court correctly found aggravating circumstances that defendant had been convicted of offense, murder, for which life imprisonment or death was imposable, that defendant had been convicted of felony involving use or threat of violence, and that offense was committed in especially heinous manner. A.R.S. § 13–703, subd. F, pars. 1, 2, 6.

20. **Homicide** ⇐354

Evidence supported trial court's finding that character of defendant, convicted of first-degree murder, had not changed between time of conviction and resentencing, and thus, such was not mitigating factor sufficient to outweigh aggravating circumstances warranting death sentence. A.R.S. §§ 13–451 to 13–453 (Repealed).

21. **Homicide** ⇐354

In first-degree murder prosecution, imposition of death penalty was not disproportionate to penalty imposed in similar cases, in which defendants robbed and murdered their victims. A.R.S. §§ 13–451 to 13–453 (Repealed).

22. **Criminal Law** ⇐1213
Homicide ⇐351

Death penalty statute, on its face and in application, does not allow for arbitrary and capricious determinations, and is thus not violative of Eighth Amendment. A.R.S. § 13–703; U.S.C.A. Const.Amend. 8.

23. **Criminal Law** ⇐1208(1)

Neither Federal Constitution nor Arizona Supreme Court require that imposition of death penalty precisely reflect composition of general population.

24. **Criminal Law** ⇐1208(6)

Before one is subject to death penalty, state must charge him and prove him guilty beyond reasonable doubt, and must prove aggravating circumstances beyond reasonable doubt.

25. **Criminal Law** ⇐1134(8), 1208(6)

When death penalty is imposed, trial court may find mitigating factors substantial enough to call for leniency, and Supreme Court will then conduct independent review of all matters of aggravation and mitigation to determine if death sentence was properly imposed, and will conduct proportionality review in every case to assure penalty is not excessive nor disproportionate to sentences imposed in similar cases; such safeguards are blind to color, wealth or sex of defendant.

Specially Concurring Opinion

26. **Homicide** ⇐354

Although murder victim was run over twice and his skull crushed, and although the victim's appearance was "ghastly", the offense was not especially heinous and depraved, as regarded the propriety of imposing death penalty, where there was no showing that defendant inflicted any violence on victim which he must have known was beyond the point necessary to kill, and where there was no suggestion of distinct acts, apart from the killing, specifically performed to mutilate victim's body. A.R.S. § 13–703, subd. F, par. 6.

Robert K. Corbin, Atty. Gen. by William J. Schafer III, and Jack Roberts, Asst. Atty. Gen., Phoenix, for appellee.

Richard S. Oseran, Former Pima County Public Defender, Frederic J. Dardis, Pima County Public Defender by Allen G. Minker, Tucson, for appellant.

HOLOHAN, Chief Justice.

Appellant, Willie Lee Richmond, was found guilty of first degree murder on February 5, 1974, and was sentenced to death. This court affirmed the conviction and the sentence in *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41 (1976), *cert. denied*, 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1977). However, we later vacated the death sentence pursuant to *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978), *cert. denied*, 440 U.S. 924, 99 S.Ct. 1254, 59 L.Ed.2d 478 (1979), and remanded for resentencing.

After a sentencing hearing, appellant again was sentenced to death, from which sentence he now appeals. Additionally, appellant asks that we review the denial of his petition for post-conviction relief. We have jurisdiction pursuant to A.R.S. § 13–4031 and Rule 32.9, Arizona Rules of Criminal Procedure, 17 A.R.S.

The conviction arose from a 1973 incident where appellant and his 15-year-old girlfriend, Faith Erwin, accompanied Becky Corella and Bernard Crummett to a Tucson motel. Becky had arranged to perform an act of prostitution with Crummett. Becky informed appellant that Crummett was "loaded." Appellant decided to rob Crummett.

Appellant accompanied by the two women and Crummett drove to a deserted area outside Tucson ostensibly for Crummett to engage in another act of prostitution with Becky. Appellant stopped the car feigning a flat tire. Appellant alighted from the car and went to the passenger side where he pulled Crummett from the car. Appellant knocked Crummett to the ground, and, as Crummett lay on the ground, appellant hit him with several large rocks, causing Crummett to lose consciousness. Becky took the victim's watch and wallet from his pockets. Appellant and the two women left Crummett lying unconscious on the ground, but, before leaving, the vehicle was twice driven over him.

Medical testimony revealed that Crummett died of a compressive injury to the skull consistent with the excessive force of a wheel of a car. At trial Faith Erwin testified that appellant was the driver of the automobile when it was driven over the victim. Appellant claimed that Becky Corella was the driver.

NOTICE

[1, 2] Appellant claims a violation of his sixth amendment right to know the nature and cause of the accusation against him because the information did not put him on notice that he could receive the death penalty, nor did it state what aggravating factors would be presented. Appellant did not raise this issue at the time he appealed his conviction, but, as we are required, pursuant to A.R.S. § 13–4035, to search the record for fundamental error, we will address this issue. Appellant was charged with first degree murder in violation of A.R.S. § 13–451, § 13–452 and § 13–453.[1] At that time § 13–453 provided that "a person

1. These are section numbers under the old criminal code, they have since been renumbered or repealed.

guilty of murder in the first degree shall suffer death or imprisonment in the state prison for life." In *State v. Blazak*, 131 Ariz. 598, 643 P.2d 694 (1982), we addressed the issue raised by appellant, and we held that an indictment charging first degree murder was sufficient on its face to inform the defendant of the crimes charged and the sentences which could be imposed. Due process requires that a defendant be advised of the specific charges against him. The information in this case gave appellant adequate notice of the charges. There is no requirement that a defendant be advised in the indictment or information of the statutory penalty, or that he be advised what aggravating circumstances will be presented at sentencing in the event of a conviction.

SPEEDY TRIAL

[3] Appellant was first sentenced to death in February of 1974. He was resentenced to death in 1980. Now appellant claims he was denied his right to a fair and speedy sentencing, and that he was prejudiced by the six-year gap which deprived him of the ability to effectively present his case for mitigation. We addressed this issue in *State v. Blazak, supra*, where we stated, "[n]either this court nor the United States Supreme Court has found that the right to a speedy trial extends to sentencing." 131 Ariz. at 600, 643 P.2d at 696, citing *State v. Steelman*, 126 Ariz. 19, 612 P.2d 475 (1980).

[4] The delay resulted in the appellant having an opportunity to present additional evidence as mitigation. Additionally appellant has failed to show how he was prejudiced. He was afforded the opportunity to present his original mitigating evidence as well as any additional mitigating factors which may have been omitted in the first sentencing hearing or which have arisen since that hearing. The sentence he received at his resentencing was no harsher than the original sentence. We are unable to find any prejudice resulting from the delay.

RESENTENCING UNDER WATSON

[5] On numerous occasions this court has heard and rejected arguments that resentencing under *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978), *cert. denied* 440 U.S. 924, 99 S.Ct. 1254, 59 L.Ed.2d 478 (1979) is unconstitutional. Appellant asserts several grounds for this argument claiming the resentencing is: (1) a violation of ex post facto prohibitions; (2) a violation of double jeopardy prohibitions; and (3) a violation of the due process and separation of powers requirements because it is a judicially created penalty. We have addressed these issues many times before with resolutions adverse to appellant. *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983); *State v. Blazak*, 131 Ariz. 598, 643 P.2d 694 (1982); *State v. Jordan*, 126 Ariz. 283, 614 P.2d 825, *cert. denied*, 449 U.S. 986, 101 S.Ct. 408, 66 L.Ed.2d 251 (1980). These arguments have also been considered and rejected by the Ninth Circuit Court of Appeals in *Knapp v. Cardwell*, 667 F.2d 1253, *cert. denied*, —— U.S. ——, 103 S.Ct. 473, 74 L.Ed.2d 621 (1982).

SENTENCING CHALLENGES

[6, 7] The sentencing procedure is contested by appellant on three other grounds. First, that he was denied his alleged constitutional right to have a jury decide the presence of aggravating or mitigating circumstances. We have previously rejected this argument. *State v. Gretzler, supra; State v. Blazak, supra; State v. Watson, supra.* Second, appellant contends it is unconstitutional to place the burden of proof of mitigating circumstances on the defendant. Once the defendant has been found guilty beyond a reasonable doubt, due process is not offended by requiring the defendant to establish mitigating circumstances. As we stated in *State v. Smith*, 125 Ariz. 412, 416, 610 P.2d 46, 50 (1980), "[f]acts which would tend to show mitigation are peculiarly within the knowledge of a defendant."

Third, appellant claims he was denied his right to be sentenced by an impartial trier of fact. This contention is based on evidence which was introduced at the original sentencing. At the first sentencing hearing, defense counsel presented psychiatric testimony which classified appellant as a sociopath or psychopath. This condition was described as one who never learns from experience, has poor impulse control, has a lack of moral insight and shows very little guilt. The psychiatrists characterized appellant as callous, grossly selfish, irresponsible and impulsive. This testimony was introduced as mitigation.

Under the Arizona death penalty statute in effect at the time, the judge could consider *only* four enumerated factors as mitigation. One of the statutory mitigating circumstances was that "the defendant's capacity to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution."[2] The psychiatric testimony was intended to show the existence of this particular mitigating factor. The judge did not find this factor to exist.

Five years later, when this court ordered a resentencing, the case was returned to the original trial judge. Appellant's request for a change of judge was denied by the presiding judge.[3] At the time of the resentencing, the Arizona death penalty statute, A.R.S. § 13-703, required that the judge who heard the case also conduct the sentencing. *State v. McDaniel*, 127 Ariz. 13, 617 P.2d 1129 (1980). The statute has recently been amended to allow a judge other than the trial judge to conduct the sentencing hearing if the trial judge has died, resigned, or become incapacitated or disqualified.

[8, 9] A litigant is entitled to an impartial judge at any stage of the proceedings. *See, State v. Barnes*, 118 Ariz. 200, 575 P.2d 830 (App.1978). However this does not include a judge totally ignorant of the previous proceedings. Any judge who might have conducted the resentencing in this case would have before him the record of the trial and the original sentencing hearing. Appellant presents no evidence that the sentencing judge entertained actual bias or prejudice against him. We stated in *State v. Greenawalt*, 128 Ariz. 150, 168, 624 P.2d 828, 846 *cert. denied*, 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981), "evidence is not inadmissible simply because it paints a black picture of the defendant's character or his bent for evil." Without some specific showing of bias on the part of the sentencing judge, we cannot say appellant was prejudiced or deprived of due process. From time to time appellate courts send cases back to a trial court for resentencing. The fact of resentencing is not sufficient, standing alone, to infer bias or prejudice.

The psychiatric evidence of the first mitigation hearing was not used in the second hearing, and there was no reference to that evidence in the second hearing.

[10] Additionally, in each case where the death penalty is imposed, this court conducts an independent review of the record to assure a just result. We have reviewed the record in the instant case, and find no evidence of prejudice exhibited by the sentencing judge.

FELONY MURDER AND THE DEATH PENALTY

The jury which convicted appellant was instructed on both theories of first degree murder—premeditation and felony murder. The jury returned a verdict of first degree murder. There is no indication in the record whether the jury's verdict was based on premeditation or felony murder.

The appellant contends that under the state of the record in this case the penalty of death cannot be imposed. The United States Supreme Court recently discussed the issue of felony murder in *Enmund v. Florida*, —— U.S. ——, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). The Court observed:

2. Former A.R.S. § 13-454(F)(1), renumbered as A.R.S. § 13-703(G)(1).

3. The motion was denied because it was not timely made. We will, however, examine this contention for fundamental error.

Enmund himself did not kill or attempt to kill; and as construed by the Florida Supreme Court, the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder. Yet under Florida law death was an authorized penalty because Enmund aided and abetted a robbery in the course of which a murder was committed.

Id. at ——, 102 S.Ct. at 3377, 73 L.Ed.2d at 1152. The Court concluded that death was not a valid penalty for one who neither took life, attempted to take life, nor intended to take life.

[11] By comparison, in the instant case appellant was an active participant. Appellant admitted he planned the robbery, drove the victim into the desert and knocked the victim unconscious to rob him. Faith Erwin testified that appellant threw rocks at the victim after he knocked him to the ground. Bloody rocks were found at the scene. The medical examiner testified that there were two kinds of force applied to the victim's skull—one which was consistent with the automobile tire and another in which there was external application of a pointed object. There is, however, no evidence that the latter force alone would have killed the victim.

Even if we accept appellant's contention that he was not driving the car when the victim was run over, we do not believe this case falls within the parameters of *Enmund*. The facts from the appellant's version indicate that he was the leader of the group; he was the first to use violent force on the victim; he was aware that the victim, if allowed to live, could identify him. Appellant, from his version of the facts, was willing to leave the wounded and unconscious victim alone in the desert to an uncertain fate. Appellant contends that Becky Corella was the one who drove the car over the victim. There is no evidence that appellant protested or showed any emotion when the victim was twice run over. The appellant's version of the facts indicates appellant played an integral part in the events which caused the victim's death, and he willingly assisted in the acts which were intended to cause the victim's death.

The evidence presented by the state was that the appellant drove the vehicle over the victim, thus killing him. The testimony of Faith Erwin was that the appellant was the driver at the time the victim was run over. The circumstantial evidence supports Faith's testimony. The circumstances show that appellant was the driver when the group left for the desert. The other woman, Becky Corella, was so short in stature that it was difficult for her to operate an automobile. Appellant was the leader of the group and directed the operation. With such support we believe the trial judge was justified in concluding that appellant drove the vehicle that was used to kill the victim.

Under either version of the facts appellant does not fit within the sphere of defendants the *Enmund* court seeks to protect from capital considerations. The evidence in this case shows that appellant intended to take a life.

PRIOR CONVICTION

Appellant was convicted in the instant case on February 5, 1974. He was convicted of another murder on August 9, 1974, even though that murder had occurred before the murder in the instant case. At the resentencing in 1980 the State sought to use this later conviction as an aggravating factor. Appellant argues this was improper.

A.R.S. § 13–703(F) enumerates aggravating circumstances which should be considered in determining the imposition of the death penalty. A.R.S. § 13–703(F)(1) states that "the defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable." Citing *State v. Ortiz*, 131 Ariz. 195, 639 P.2d 1020 (1981), *cert. denied*, 456 U.S. 984, 102 S.Ct. 2259, 72 L.Ed.2d 863 (1982), appellant contends the trial court erred in finding this aggravating circumstance.

In *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983), this court stated:

> Convictions entered prior to a sentencing hearing may thus be considered regardless of the order in which the underlying crimes occurred, *State v. Jordan*, [*supra*,] or the order in which the convictions were entered. [*State v. Valencia*, 124 Ariz. at 139, 602 P.2d at 807, 809 (1979)].
>
> Any language suggesting the contrary in *State v. Ortiz, supra*, [131 Ariz. at 210–11, 639 P.2d at 1035–36] is hereby disapproved. In *Ortiz*, we found the trial court erred in considering a contemporaneous conviction for conspiracy to commit murder as aggravation for the murder. This exclusion from consideration is best understood as having been required because both convictions arose out of the same set of events.

135 Ariz. at 57, n. 2, 659 P.2d at 16, n. 2.

[12] In light of the language in *Gretzler*, the trial court did not err in finding the prior murder conviction to be an aggravating circumstance.

CRUEL AND HEINOUS

[13, 14] The trial court found as another aggravating factor that the offense had been committed in an especially cruel and heinous manner pursuant to A.R.S. § 13–703(F)(6) which provides: "The defendant committed the offense in an especially heinous, cruel or depraved manner." Appellant contends this was error.

"Cruel" has been defined as "disposed to inflict pain especially in a wanton, insensate or vindictive manner: sadistic." *State v. Knapp*, 114 Ariz. 531, 543, 562 P.2d 704 (1977), *cert. denied*, 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978). Cruelty involves the victim's pain or suffering before death. *State v. Gretzler, supra; State v. Poland*, 132 Ariz. 269, 645 P.2d 784 (1982); *State v. Lujan*, 124 Ariz. 365, 604 P.2d 629 (1979). The offense must be committed in an *especially* cruel, heinous or depraved manner to be considered an aggravating circumstance. *State v. Lujan, supra*. We do not find the offense to be especially cruel; there is no evidence in the record to indicate the victim suffered more pain than that of the initial blow which rendered him unconscious.

[15, 16] "Heinous" has been defined as "hatefully or shockingly evil; grossly bad," and "depraved" is "marked by debasement, corruption, perversion or deterioration." *State v. Knapp, supra*. Heinous and depraved involve the mental state and attitude of the offender as reflected in his words and actions. *State v. Gretzler, supra; State v. Poland, supra; State v. Lujan, supra*. In *Gretzler, supra*, we discussed factors which lead to a finding of heinousness or depravity. One factor is the infliction of gratuitous violence on the victim; another related factor is the needless mutilation of the victim. Here the victim was already unconscious and bleeding when he was run over not once, but twice, each time from a different direction. The evidence indicates that the first run by the vehicle was over the victim's head crushing his skull and killing him. The second run of the vehicle was over the body of the victim. The investigating officers found, at the location of the murder, two large pools of blood separated by about 30 feet, which was consistent with the body having been run over and dragged to where it was found. Again the fact that the victim in the instant case was run over twice and his skull was crushed, we find to be a ghastly mutilation of the victim.

The presence of any one of the three elements—cruel, heinous, or depraved—is sufficient to constitute an aggravating circumstance. *State v. Bishop*, 127 Ariz. 531, 622 P.2d 478 (1980). We believe the facts of this case set it "apart from the normal first degree murders." *State v. Brookover*, 124 Ariz. 38, 601 P.2d 1322 (1979). The trial court was correct in finding the offense was committed in an especially heinous manner. It is also evident that the trial court could have found that the offense was committed in an especially depraved manner.

Appellant argues in the alternative that the "cruel, heinous and depraved" language of Arizona's death penalty statute is unconstitutionally vague and broad. We have addressed this contention in *State v. Gretz-*

ler, supra, and found no constitutional infirmity in the statute.

The trial court judge did not find that "the defendant committed the offense as a consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value." A.R.S. § 13–703(F)(5). The trial court judge was under the mistaken belief that this subsection only applied to the "contract" type murder. Appellant was sentenced on March 13, 1980. This was prior to our decision in *State v. Clark*, 126 Ariz. 428, 616 P.2d 888, *cert. denied*, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980), where we specifically held that this aggravating circumstance is not limited to the "hired gun" or "contract" type killing. In *Clark* we stated that this subsection applies to any murder committed for financial gain.

The state addressed this issue in its answering brief, but did not raise the issue through a cross-appeal. Thus, we need not reach the issue of the propriety of this court finding an additional aggravating circumstance which was not found by the trial court.

MITIGATING CIRCUMSTANCES

[17] At the 1980 sentencing hearing appellant presented evidence of his conduct in prison since 1974 when he first went to death row. Testimony was received from members of appellant's family, his friends, and from prison counselors which related appellant's good character, the change in attitude he has undergone and his attempts to better himself. Appellant contends the trial court erred in failing to find his improved conduct and character to be a mitigating circumstance. Appellant cites *State v. Watson (II)*, 129 Ariz. 60, 628 P.2d 943 (1981), where very similar evidence was presented as mitigation. There we held that the evidence could and should be considered a mitigating circumstance. While it would have been an arbitrary decision had the court refused to consider the evidence, it is clear from the record the court *did* consider the evidence but found it unpersuasive.

INDEPENDENT REVIEW

[18, 19] The sentencing statute, A.R.S. § 13–703, provides that the death penalty shall be imposed if the court finds one or more aggravating circumstances and "there are no mitigating circumstances sufficiently substantial to call for leniency." In death penalty cases, this court will conduct an independent examination of the record to determine for ourselves the presence or absence of aggravating and mitigating circumstances and the weight to give each. We also independently determine the propriety of the sentence. *State v. Gretzler, supra, State v. Blazak, supra.* The trial court correctly found three aggravating circumstances: first, that the defendant has been convicted of an offense (murder) for which life imprisonment or death was imposable, A.R.S. § 13–703(F)(1); second, that the defendant has been convicted of a felony (murder and kidnapping) involving the use or threat of violence, A.R.S. § 13–703(F)(2); third, that the offense was committed in an especially heinous manner, A.R.S. § 13–703(F)(6).

As mitigating factors the court found that both Rebecca Corella and Faith Erwin were involved in the crime but were never charged, that the victim had engaged in an illegal act of prostitution with Rebecca Corella near the time of the offense and had solicited an act of prostitution with Faith Erwin, a minor, near the time of the offense. The court also found that the jury was instructed on the felony murder rule as well as on matters related to premeditated murder. Additionally, the court found appellant's family was supportive of him and would suffer considerable grief as a result of the imposition of the death penalty.

[20] The trial court did consider evidence regarding appellant's change in character, but was unable to make a definitive finding on the matter. In *State v. Watson* (II), *supra*, we held that evidence revealing a substantial improvement of a defendant's character could be viewed as a mitigating factor. In the case at bench the trial court was not convinced that appellant's character had changed. We do not believe this position was unreasonable. The trial court was able to observe appellant at the resentencing hearing and listen to his testimony. The trial court was also aware appellant had been in a very controlled environment while his alleged change of character took place, with much to gain from his good behavior. Additionally the judge had evidence before him of the lifestyle appellant led before his incarceration, including the fact he was involved in another murder. These facts cast sufficient doubt upon appellant's veracity so the trial court could reasonably decline to find the proffered evidence to be a mitigating factor. The court further found that there were no mitigating circumstances sufficiently substantial to call for leniency.

We believe the mitigation offered by appellant is not sufficiently substantial to outweigh the aggravating circumstances. Particularly we note the fact that this is not the first murder which appellant has perpetrated, as well as the gruesome manner in which this murder was committed. The death sentence is appropriate in this case.

Appellant likens his case to *State v. Watson* (II), 129 Ariz. 60, 628 P.2d 943 (1981), where we set aside the death sentence. Both cases involve a robbery and subsequent murder. Both defendants presented as mitigation evidence of a significant change in their character for the better, and both defendants received harsher sentences than their accomplices. However, the aggravating circumstances are very different in that the offense in *Watson* was not found to be especially heinous and depraved. Moreover, the defendant in *Watson* had only one prior conviction for robbery, while appellant in the instant case has prior convictions for both kidnapping and murder in separate incidents. Additionally, in *Watson* there were other compelling factors in mitigation—the age of the defendant (21) and the fact that the victim was armed and fired the first shot. We believe the differences in the cases are so significant that the different resolutions are necessary.

PROPORTIONALITY REVIEW

[22] We stated in *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41 (1976), *cert. denied*, 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1977), that we will conduct a proportionality review to determine "whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *Id.*, 114 Ariz. at 196, 560 P.2d at 51. We have considered other cases in which the defendants robbed and murdered their victims and received the death penalty. *State v. Gretzler, supra; State v. Clark, supra; State v. Jordan, supra; State v. Ceja*, 126 Ariz. 35, 612 P.2d 491 (1980); *State v. Evans*, 120 Ariz. 158, 584 P.2d 1149 (1978), *sentence aff'd*, 124 Ariz. 526, 606 P.2d 16, *cert. denied*, 449 U.S. 891, 101 S.Ct. 252, 66 L.Ed.2d 119 (1980). We find that the resolution in the instant case is not disproportionate to these cases.

CONSTITUTIONAL CHALLENGES

[23] Appellant challenges the constitutionality of the Arizona death penalty statute claiming the statute, on its face and in application, is violative of the eighth amendment in that it allows for arbitrary and capricious determinations. We have previously considered and rejected this issue. *State v. Gretzler, supra; State v. Blazak, supra; State v. Richmond, supra.*

[24] The death penalty was challenged by appellant in a Rule 32 petition for post-conviction relief on the ground that in Arizona this penalty has been imposed in a manner discriminatory against black persons. This post-conviction relief was denied and we granted his petition for review which we consolidated with this appeal. In addition, appellant claims he was denied due process of law when the court refused to hold a hearing on this claim. In a similar argument appellant claims the death penalty has been visited upon poor persons and male persons in disproportionate numbers. We agree with the state's assertion that neither the federal constitution nor this

court has ever required that the imposition of the death penalty precisely reflect the composition of the general population. What the United States Supreme Court has required is guidelines to bridle the discretion of the sentencing authority, thus minimizing the risk of arbitrary imposition of the death penalty. *See Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

[24, 25] Before one is subject to the death penalty in Arizona, the state must charge him and prove him guilty beyond a reasonable doubt. Then the state must prove aggravating circumstance(s) beyond a reasonable doubt. *State v. Jordan*, 126 Ariz. 283, 614 P.2d 825 (1980). The trial court may then find mitigating factors substantial enough to call for leniency. This court will then conduct an independent review of all matters of aggravation and mitigation to determine if the death sentence was properly imposed. *State v. Gretzler, supra; State v. Richmond, supra.* In addition, we conduct a proportionality review in every case to assure the penalty is not excessive nor disproportionate to the sentences imposed in similar cases. *State v. Gretzler, supra; State v. Richmond, supra.* These safeguards are blind to the color, wealth or sex of the defendant. We find no merit in appellant's argument.

We do not find it necessary to address appellant's last contention that the death penalty is a violation of international law.

We have examined the entire record for fundamental error, as required by A.R.S. § 13–4035, and find none.

The sentence of death is affirmed.

HAYS, J., concurs.

CAMERON, Justice, specially concurring.

[26] I agree that the death penalty is properly imposed in this case. However, because I disagree with the majority in its holding that the crime was especially heinous and depraved, I feel that I must specially concur.

I do so not because I am insensitive to the tragic consequences of defendant's criminal conduct, but because I believe that if the death penalty statute in Arizona is to pass constitutional muster, it must be interpreted in such a way that only those who clearly come within the mandate of our legislature and the United States Supreme Court are given this punishment. The death penalty is reserved only for those crimes which are above the norm of first degree murders, or for defendants who are above the norm of first degree murderers. *State v. Zaragoza*, 135 Ariz. 63, 68, 659 P.2d 22, 27–28 (1983); *State v. Watson*, 129 Ariz. 60, 63, 628 P.2d 943, 946 (1981).

The majority finds this crime to be especially heinous and depraved under A.R.S. § 13–703(F)(6), based on two of the criteria set out in *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983), the infliction of gratuitous violence on the victim, and the needless mutilation of the victim. I do not believe the facts of this case fit within the proper boundaries of these criteria.

The infliction of gratuitous violence was found and the death penalty imposed in *State v. Ceja*, 126 Ariz. 35, 612 P.2d 491 (1980), in which the defendant continued to shoot his victims after it was apparent they had been fatally wounded, and then began kicking one of the victims in the face repeatedly while the victim was already unconscious or dead. We said,

> We think that defendant's conduct in continuing his barrage of violence, inflicting wounds and abusing his victims, beyond the point necessary to fulfill his plan to steal, beyond even the point necessary to kill, is such an additional circumstance of a * * * depraved nature so as to set it apart from the 'usual or the norm.' 126 Ariz. at 40, 612 P.2d at 496, quoting *State v. Ceja*, 115 Ariz. 413, 417, 565 P.2d 1274, 1278 (1977). *See also State v. Gretzler*, supra, 135 Ariz. at 52, 659 P.2d at 11.

We similarly held that gratuitous violence was inflicted in *State v. Jeffers*, 135 Ariz. 404, 661 P.2d 1105 (1983), where after the killing the defendant climbed on top of the

corpse and beat its face repeatedly with his fists, resulting in facial wounds and bleeding. In *State v. Woratzeck*, 134 Ariz. 452, 657 P.2d 865 (1982), we also held that gratuitous violence was employed where the defendant strangled, stabbed and bludgeoned the victim to death, and the force used by each of these three methods was sufficient to kill. The death penalty was properly imposed in both *Jeffers* and *Woratzeck*.

In the instant case the victim was killed by being run over by an automobile. The evidence adduced at trial indicates the automobile was likely backed over the victim, and then driven forward over the victim. There is no evidence to suggest that the defendant knew or should have known that the victim was dead after the first pass of the car. *Cf. State v. Gerlaugh*, 134 Ariz. 164, 654 P.2d 800 (1982) (victim still alive after defendant ran over him with his automobile several times). Therefore, unlike the defendants in *Ceja*, *Jeffers*, and *Woratzeck*, supra, there has been no showing that this defendant inflicted any violence on the victim which he must have known was "beyond the point necessary to kill."

The criterion of mutilation of the victim was demonstrated by *State v. Vickers*, 129 Ariz. 506, 633 P.2d 315 (1981), where the defendant strangled to death his prison cellmate and then carved the word "Bonzai" into the victim's back. Similarly in *State v. Smith*, 131 Ariz. 29, 638 P.2d 696 (1981), after suffocating the female victims the defendant proceeded to mutilate their sex organs and breasts with sharp objects. The death penalty was imposed in these two cases based in part on the finding that the crime was committed in a heinous and depraved manner. The facts of these cases are in marked contrast to the present case. Here there is no suggestion of distinct acts, apart from the killing, specifically performed to mutilate the victim's body. Any disfigurement of the victim in this case was the direct result of the killing itself. I do not believe we should stretch the definition of "mutilation" to cover all murders in which the victim's body is disfigured, where there is no indication of a separate purpose to mutilate the corpse.

It is true, of course, that the appearance of the victim in this case was "ghastly" as the majority states. But as the United States Supreme Court has recently said in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (reversing an application of Georgia's statutory aggravating circumstance of "outrageously or wantonly vile, horrible or inhuman"),

> [I]t is constitutionally irrelevant that the petitioner used a shotgun instead of a rifle as the murder weapon, resulting in a gruesome spectacle in his mother-in-law's trailer. An interpretation of [the aggravating circumstance] so as to include all murders resulting in gruesome scenes would be totally irrational. Id. at 433, n. 16, 100 S.Ct. at 1767, n. 16, 64 L.Ed.2d at 409, n. 16 (plurality opinion). *See also* id. at 435, 100 S.Ct. at 1768, 64 L.Ed.2d at 410–11 (Marshall, Brennan, J.J., concurring) ("[We] also agree that * * * the fact that the murder weapon was one which caused extensive damage to the victim's body is constitutionally irrelevant.")

Our statutory aggravating circumstance of a heinous or depraved killing focuses on the state of mind of the killer, *see State v. Graham*, 135 Ariz. 209, at 212, 660 P.2d 460 at 463; *State v. Jeffers*, supra, 135 Ariz. at 429–430, 661 P.2d at 1130–31; *State v. Zaragoza*, supra, 135 Ariz. at 68–69, 659 P.2d at 28–29; *State v. Gretzler*, supra, 135 Ariz. at 51, 659 P.2d at 10; *State v. Wortzeck*, supra, 134 Ariz. at 457, 657 P.2d at 870, not on the appearance of the corpse. Although the resulting scene was gruesome, I believe the proper application of the criteria discussed above fails to support a finding that the killer acted in a state of mind which was especially heinous or depraved. This crime is therefore not above the norm of first degree murders.

The criminal record of this defendant, however, clearly places him above the norm of first degree murderers. He has been convicted of another first degree murder and a kidnapping, each arising in separate incidents. This history of serious violent

crime justifies the imposition of the death penalty.

I concur in the opinion of the majority except its finding that this crime was heinous and depraved, and I concur in the result.

GORDON, Vice Chief Justice, concurring.

I concur in Justice Cameron's special concurrence.

FELDMAN, Justice, dissenting.

I cannot agree with that portion of the majority decision which holds that the death penalty may now be properly imposed upon the defendant.

I agree with Justice Cameron that the murder was not heinous and depraved. The remaining aggravating circumstances in this case were that defendant had been convicted of an offense for which life imprisonment or death was imposable, A.R.S. § 13–703(F)(1), and that defendant had been convicted of a felony involving the use or threat of violence, *id.* (F)(2). Both of these circumstances pertain to the character of the defendant, defining the type of murderer and serving to set the defendant apart and above the "norm" of killers. As we stated in *State v. Watson (Watson II)*, 129 Ariz. 60, 63, 628 P.2d 943, 946 (1981):

> [T]he death penalty should be reserved for only the most aggravating of circumstances, circumstances that are so shocking or repugnant that the murder stands out above the norm of first degree murders, *or the background of the defendant sets him apart from the usual murderer.*

(Emphasis supplied.) As Justice Cameron correctly states, the crime here does not stand out "above the norm of first degree murders"; thus, the imposition of the death penalty in this case is clearly based upon the character of the defendant.

In *Watson II, supra*, we held that rehabilitation evidence could and should be considered a mitigating circumstance. *Id.* at 63–64, 628 P.2d at 946–47. Thus, *Watson II* stands for the proposition that the relevant question in such cases is not limited to defendant's character at the time of the offense, but also includes his character at the time the death penalty is to be carried out.

The majority opinion indicates that the evidence of defendant's improved conduct and character was "very similar" to that presented in *Watson II*, yet concludes that the mitigation evidence offered by defendant was not sufficiently substantial to call for leniency. While defendant's prior murder conviction weighs heavily against him, in my view the rehabilitation evidence "very similar" to that presented in *Watson II* tips the balance strongly in favor of reducing defendant's sentence to life imprisonment.

At the final sentence hearing, twelve individuals offered evidence of defendant's changed character and efforts to rehabilitate himself since his imprisonment in 1974. These witnesses included several members of his family, employees of the Arizona State Prison at Florence, a fellow prisoner on death row, and a local missionary who regularly visited and corresponded with the defendant. The theme which ran through all of the testimony at the sentence hearing was that defendant had changed remarkably since he had arrived at prison six years previously. The witnesses believed that defendant's attitude had improved materially, that he had found a purpose in life and now had a genuine desire to better himself and, more important, to help others. There seemed to be no question but that this desire to help others was more than subjective; it was actually carried into effect.

There were objective facts to support these opinions. Among the objective factors which manifested the change in defendant were the following: Defendant had transformed himself into a literate person, learning to read and write. He had learned to type. Witnesses testified that defendant often read three books a week and exchanged reading materials with other prisoners. Defendant had employed his newfound ability to read, write and type by using his time in prison in a constructive manner, typing numerous letters to family and friends, and studying the Bible. The

counselors employed at the prison testified that defendant provided encouragement, advice and spiritual assistance both to his family and to other prisoners.

Defendant's family noted the difference in his attitude. Defendant had become settled and matured. He was honestly trying to give some meaning to his life. From prison, both in the form of letters and visits from his family, defendant assisted them with their problems, gave them advice and encouraged them. He was truly concerned for his family's welfare. The same was true for his relationship with other prisoners.

The counselors employed by the prison also testified that defendant's attempts to better and rehabilitate himself were genuine. Of course, this is a matter of opinion, but it was uncontradicted and, in light of the experience of the prison counselors, I would place great weight on their assessment.

Finally, the defendant himself testified that if given life imprisonment he understood that he would never live outside prison, because the life sentence would and should be imposed consecutively to the other sentences which he was already serving. Nevertheless, he felt that he had changed and had something worthwhile to offer others in prison society and his family if he were allowed to live. Given the current problems of our prison system, it is certainly necessary that we provide inmates with role models and assistance for rehabilitation, especially when such models are based upon changes in attitude and religious commitment.[1] The record available to us thus leads to an overwhelming conclusion that defendant has made a sincere, successful and continued effort to change his character, rehabilitate himself and contribute in his own way to society. As the majority indicates, the trial court could not make a "definitive finding" on the question of rehabilitation. While the majority speculates that the trial court was "not convinced" that defendant's character had changed, the fact is that the trial court made no such finding. The majority states that the facts "cast sufficient doubt upon appellant's veracity so the trial court could reasonably decline to find the proffered evidence to be a mitigating factor." Again, the trial court made no such statement. In any event, the rehabilitation issue does not turn primarily upon defendant's testimony at all. There were twelve other witnesses, unimpeached and unrebutted on the issue, and the proof of change, rehabilitation and contribution to society stands uncontested in this case. Nor is this change some desperate, last-minute attempt by defendant to avoid the death penalty. The testimony indicated that the change in defendant's attitude and character manifested itself long before 1981 when *Watson II* first established that such a change was relevant in deciding whether to impose death.

Thus, the majority's conclusion on independent review that the trial court could have found defendant's changed character was not genuine, and therefore "could reasonably decline to find the proffered evidence to be a mitigating factor" is incorrect for two reasons. First, the trial court made no such finding. Second, there are no facts to support such a finding, even if it had been made. The State advances no such facts in this court, though it does not admit the change in character is genuine. Of

1. The conclusion that because of his change in character the defendant would serve as a useful role model for other prisoners is more than mere speculation. The May, 1983 issue of *La Roca*, a magazine published by and for prisoners at the Arizona State Prison, contains an article on defendant written by Charles Doss, a prisoner who serves as editor of the magazine. In an article commencing at page 19, entitled "Death Row Revisited," Mr. Doss writes of defendant's attitude and actions when he first came to death row ten years earlier and the remarkable change which has taken place with the passage of years. The article illustrates that both inside and outside the walls of the state prison a man's life and behavior may set an example which serves as a standard for others. The article is not part of the record, but the statute provides that mitigating evidence may be considered regardless of admissibility under the rules of evidence and may consist of "any factors" relevant to defendant's character. A.R.S. § 13–703(C) and (G).

course, it is the State's obligation to examine any purported change in character with a deservedly cynical eye. I, too, agree that it would be better if felons found God before committing their crimes rather than before being punished. It is the court's obligation, however, to recognize the possibility and principle of redemption and rehabilitation.

Further, independent review on the death penalty issue involves more than a determination of whether the trial court's imposition of this penalty can be supported by the record. It requires our own, independent conclusion from the record. *Watson II*, 129 Ariz. at 63, 628 P.2d at 946. While the aggravating circumstances which were found to exist may indicate that the defendant was above the norm of murderers, the evidence of changed character is persuasive mitigation. Review of this record indicates strong evidence of rehabilitation and the probability that if allowed to live, defendant will make a contribution of some value to society. Then what is to be gained by imposing death under these circumstances? Except in the physical sense, the defendant whom we today consign to the gas chamber is not the same person who committed the crime in 1973 and was first sentenced to death in 1974. While the passage of time should not be the test, we must acknowledge that in the ten years which it has taken to reach this point, the defendant has been given time to change. Perhaps those ten years should not have been allowed to pass, but we must remember that the statutes under which the defendant was previously sentenced to death were declared unconstitutional, *State v. Watson* (*Watson I*), 120 Ariz. 441, 586 P.2d 1253 (1978), and, as a result, defendant has been given time which he has put to good use. While quick punishment may deter, punishment of this defendant at this time serves only to illustrate that redemption and rehabilitation have no practical purpose.

Speedy imposition of the ultimate penalty might also have served the societal interest in retribution. *See Gregg v. Georgia*, 428 U.S. 153, 183, 96 S.Ct. 2909, 2929-30, 49 L.Ed.2d 859 (1976). But, again, the imposition of death upon a defendant who has changed so remarkably serves no valid purpose as far as retribution is concerned, because we now visit society's retribution upon a different person. Nor is society protected by imposition of the death penalty since reduction to life imprisonment would ensure that this defendant would not become eligible for parole during his lifetime. By putting this defendant to death in the face of his efforts to change and the reasonable prospect that if allowed to live he will be of value to society, we accomplish nothing but revenge. To some, especially those in the heat of anger, this may seem a sufficient reason to kill. The law should not be swayed by such emotions; it does not and cannot kill in anger; it rejects the concept of an eye for an eye and a tooth for a tooth.

The totality of the evidence offered in mitigation establishes sufficient grounds for this court to reduce defendant's sentence to life imprisonment without possibility of parole for 25 years, to be served consecutively to all other sentences. Accordingly, I dissent from the portion of the opinion which, on independent review, affirms the imposition of the death sentence.

APPENDIX D

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA, Plaintiff,

vs.

WILLIE LEE RICHMOND, Defendant.

No. A-24252

Tucson, Arizona

March 13, 1980

Thursday,

BEFORE: The Hon. Richard N. Roylston, Judge
Division No. VII

APPEARANCES:

James Howard, Esq., Deputy County Attorney, appearing in behalf of the State

Allen Minker, Esq., Ass't. Public Defender, appearing in behalf of the Defendant

RE-SENTENCING

Volume 3

Mary Bernal
Court Reporter

and just result will occur in the future.

The future of Case A-24252 is no longer in 1973 or 1974. It is 1980 now, and I submit again that the sentence in this case should be life imprisonment.

THE COURT: Do you have anything further, Mr. Howard?

MR. HOWARD: Nothing further.

THE COURT: At this time, we will proceed with the sentencing.

Other than the matters raised by your previous motions, Mr. Minker, is there any other legal reason why sentencing, at this time, should not be pronounced?

MR. MINKER: No, Your Honor.

THE COURT: Is there anything further you wish to advise the Court?

THE DEFENDANT: No, Your Honor.

THE COURT: I believe this was sent back for resentencing only as to Count 1 of the charge and pursuant to Section 13-454 Subsection C.

The Court returns the following special verdict as to the findings of existence or nonexistence of circumstances set forth in Subsection E and F.

As to Subsection E, that is the aggravating circumstances to be considered; as to Count 1: the Court finds that the defendant has been convicted of another

offense in the United States, for which under Arizona law a sentence of life imprisonment was imposable, that being Case No. A-24176 in the Superior Court of Pima County, State of Arizona.

As to that finding, the Court further finds that if this case is not properly includable under this section, it is properly includable under Subsection 2.

Now, as to Subsection 2, the Court finds that the defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person, that being Case No. A-17969, in the Superior Court of Pima County, State of Arizona.

As to Items 3 and 4, the Court finds nonexistence of those items. That should be as to Items 3, 4 and 5.

As to Item 6, the Court finds that the defendant did commit the offense in this case in an especially heinous and cruel manner.

As to Subsection F, mitigating circumstances; as to Item 1: The Court finds the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law was not significantly impaired.

As to Item 2, the Court finds that the defendant was not under unusual or substantial duress.

As to Items 3 and 4, the Court finds nonexistence

of those items.

Now, the law has since added an Item 5 in that statute. It wasn't in there at the time of the original sentencing. However, Item 5 is the defendant's age. The Court will make a finding on that also. That was also one of the requested findings by the defense.

The Court finds that the defendant was age 25 years at the time of the offense and finds that the age in this case is not a mitigating factor.

Now, the defense having raised certain specific items for the Court's consideration as mitigating factors and having requested that the Court make findings as to those mitigating factors, the Court will do so.

As to Item 1, the Court finds that Rebecca Corella was involved in the offense but was never charged with any crime.

As to Item 2, the Court finds that Faith Irwin was involved in the offense but was never charged with any crime.

As to Item 3, the Court finds that the victim had engaged in an illegal act of prostitution with Rebecca Corella near the time of the offense; and, the Court also finds that the victim had solicited an illegal act of prostitution with Faith Irwin, a minor, near the time of the offense.

As to Item 4, the Court finds that the jury was instructed both on matters relating to the felony murder rule, as well as matters relating to premeditated murder.

As to Item 5, that was the one raised by the defense regarding age, and the finding has already been made by the Court on that.

As to Item 6, the defense claims that the character of the defendant has changed substantially for the better since the time of the conviction of the offense, and to this item, the Court is unable to make a definitive finding.

As to Item 7, the Court finds that the defendant's family is supportive of the defendant and will suffer considerable grief as the result of any death penalty which might be imposed.

MR. MINKER: Excuse me, Your Honor. May I interrupt?

THE COURT: Yes.

MR. MINKER: Your Honor found the existence of the facts concerning Rebecca Corella and Faith Irwin, plus the next two facts submitted to the Court, but the Court did not state whether the Court would or would not consider these to be mitigating circumstances. I would ask the Court to so state whether the Court considers

them to be mitigating circumstances or not.

THE COURT: And the Court has considered all of the items raised by the defense on the question of mitigating circumstances.

The Court further finds that considering both the enumerated circumstances in the statutes and the enumerated circumstances raised by the defense, and having considered them separately and as a whole, the Court finds that there are no mitigating circumstances sufficiently substantial to call for leniency.

The jury having heretofore returned a verdict of guilty to first degree murder and the Court having heretofore entered a judgment of guilt as to that charge on February 27, 1974; it is the judgment of the Court that the defendant be sentenced to death.

It is further ordered that the clerk file the notice of appeal as provided for by the Rules of Criminal Procedure pursuant to Section 26-15.

It is further ordered that the defendant shall remain in the custody of the sheriff and to be returned to the Arizona State Prison.

Any further findings today?

MR. MINKER: Perhaps before Willie is taken away today, might he be able to visit with his family before he leaves today?

THE COURT: And the Court requests that the sheriff allow visitation between the defendant and his family. Now, that is just a request. That is not an order. It is a request.

MR. MINKER: I have been asked by Willie that the Court would order telephone calls.

THE COURT: Yes. How many do you want? How many are you requesting, Mr. Minker?

MR. MINKER: I'm sorry. Did you ask how many telephone calls?

THE COURT: Yes.

MR. MINKER: Three.

THE COURT: And apparently, this form of Notice of Appeal, Mr. Minker, you have to sign it and then I am directing the clerk to file it.

MR. MINKER: You wish me to sign it?

THE COURT: I think that would be appropriate.

MR. MINKER: May I take this, at this time, Your Honor? May I discuss it with the clerk a little later?

THE COURT: The only reason I am making that order is that it looks like the rule says that I am supposed to make that type of order, at this time. If you want some type of delay, I would certainly consider it.

MR. MINKER: Well, since it is automatic, I have a designation that I wish to make with it. I would prefer to use my own Notice of Appeal.

THE COURT: The record may show that the form which will be filed by the clerk under the Court's direction may be taken by Mr. Minker and filed at the same time that he files his own drafted form.

Is there anything further, at this time?

MR. MINKER: No, Your Honor.

THE COURT: The court stands at recess.

(Whereupon, the hearing was concluded at 3:50 p.m.)

APPENDIX E

IN THE SUPERIOR COURT OF

THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

JUN 24 4 23 PM 1974

BY J. Hucko DEPUTY

STATE OF ARIZONA,

Plaintiff,

vs.

WILLIE LEE RICHMOND,

Defendant.

No. A-24252

Mitigation Hearing

February 25, 1974

State of Arizona

County of Pima

(1)

why sentence should not be pronounced?

MR. BOLDING: None that I can think of at this time, Your Honor.

THE COURT: Is there anything further that you would wish to advise the Court prior to sentencing?

MR. BOLDING: Nothing further, Your Honor.

THE COURT: Mr. Richmond, I have read your letter that you sent to me. Is there anything further that you want to tell me at this time that you think I should know?

THE DEFENDANT: No, not right now.

THE COURT: Well, as to count two of the charge, the jury having found you guilty of the crime of robbery, it is the judgment of the court that you are guilty as charged. It is the further judgment of the court that you be sentenced to the Arizona State Penitentiary for a period of not less than fifteen nor more than twenty years.

Now, as to Count One, the record may show that pursuant to section 13-454 subsection "C" the Court returns the following special verdict as to the findings of the existence or non-existence of circumstances set forth in subsection "E" and "F" that the subsection "E" aggravating

circumstances to be considered as to item one, the court finds non-existence of that item.

Item two. The court finds the defendant was previously convicted of a felony in the United States and involving the use or threat of violence on another person. That being the case, #A-19769 in Pima County Superior Court as to items #, #4, and #5, the court finds the non-existence of those items.

As to item #6 the court finds the defendant did commit the offense in a specially henious and cruel manner.

Now, as to subsection "F", mitigating circumstances as to item one, the court finds the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was not significantly impaired. As to item two the defendant was not under unusual or substantial duress. And as to items #3 and #4 the court finds the non-existence of those items.

The jury having returned a verdict of guilty to the crime of first degree murder, the judgment of the court is that you are guilty as charged. It is the further judgment of the court that you are sentenced to death.

It is ordered that the clerk shall file a notice of appeal as provided by the rules of civil procedure.

It is ordered that the defendant shall remain in the custody of the Sheriff for transportation to the Arizona State Penitentiary.

Now, there is an automatic appeal insofar as Count One is concerned. Insofar as Count Two is concerned I assume that that would be included in the same appeal, but in the event that there is some question, I advise the defendant at this time as to Count Two you have the right to appeal from all proceedings in this court. Notice of appeal must be filed within 20 days from this date. You have the right to have an attorney to represent you on appeal. If you can't afford an attorney, the court will appoint one to represent you. The court will provide you with the transcript of all proceedings at the expense of Pima County.

It is ordered that the Public Defender be appointed to represent the defendant on appeal to the Arizona Supreme Court.

Is there anything further at this time? If not the court will stand at recess.

No. 91-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

WILLIE LEE RICHMOND,

Petitioner,

v.

SAMUEL A. LEWIS, Director,
Arizona Department of Corrections; and
ROGER CRIST, Superintendent of the
Arizona State Prison,

Respondents.

CERTIFICATE OF SERVICE

TIMOTHY K. FORD hereby certifies:

That on the 15 day of January, 1992, I mailed a copy of the Petition for a Writ of Certiorari in this case by United States Mail, postage prepaid, to:

Jack Roberts
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Timothy K. Ford
Attorney for Petitioner

ORIGINAL

NO. 91-7094

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

WILLIE LEE RICHMOND,

Petitioner,

-vs-

SAMUEL A. LEWIS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
NINTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the eighth and fourteenth amendments prohibit imposition of the death penalty when both the trial court and the Arizona Supreme Court have found that petitioner intended to cause, and did cause, the death of the victim, and the evidence at trial, including circumstantial evidence, supports those findings?

2. When the law of the state provides that if the prosecution proves one aggravating circumstance, the death penalty shall be imposed unless the defendant produces substantial mitigation, and the state proves beyond a reasonable doubt three aggravating circumstances, two of which petitioner has never challenged, does a federal habeas corpus court violate the constitution by determining: (a) under this Court's decision in Lewis v. Jeffers, a rational fact-finder could have found that petitioner committed the offenses in an especially heinous manner; (b) even if the especially heinous factor were eliminated, the remaining two, unchallenged aggravating circumstances would still justify the death penalty?

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TABLE OF CASES AND AUTHORITIES

OPINIONS BELOW

The Ninth Circuit Court of Appeals issued its opinion on December 26, 1990. Petitioner timely moved for rehearing and suggested rehearing en banc. On October 17, 1991, the panel who studied the record in this case and twice heard oral argument unanimously rejected the motion for rehearing and the suggestion for rehearing en banc. Four judges dissented from denial of the suggestion for rehearing en banc. (Appendix B to the Petition for Writ of Certiorari.) Richmond's counsel filed a renewed petition for rehearing and suggestion for rehearing en banc. Respondents moved to strike that renewed motion and the Ninth Circuit granted respondents' motion. On December 18, 1991, the Ninth Circuit filed an amended opinion and on January 14, 1992, the Ninth Circuit filed a further amended opinion. (Appendix A to this response.)

JURISDICTION

On December 26, 1990, the Ninth Circuit Court of Appeals issued its original opinion. Defense counsel filed a timely petition for rehearing, which was denied on October 17, 1991. Since the petition for a writ of certiorari was filed within 90 days of October 17, 1991, it is timely under this Court's rules.

Richmond invokes this Court's discretionary jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case also involves the Fourteenth Amendment, which provides in part:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In addition, this case involves the following provisions of Arizona law:

> In determining whether to impose a sentence of death or life imprisonment without possibility of release on any basis until the defendant has served twenty-five calendar years if the victim was fifteen or more years of age or thirty-five calendar years if the victim was under fifteen years of age, the court shall take into account the aggravating and mitigating circumstances included in subsections F and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

A.R.S. § 13-703(E).

* * *

> The defendant committed the offense in an especially heinous, cruel or depraved manner.

A.R.S. § 13-703(F)(6).

STATEMENT OF THE CASE

THE TRIAL

Saturday night, August 25, 1973 -- the last night of his life -- Vietnam veteran Bernard Crummett met Rebecca Corella, Faith Erwin, and Richmond at the Birdcage Bar in Tucson. Richmond, then 25, refused to let Faith, his 15-year-old girlfriend, prostitute herself with Crummett; Becky, a former girlfriend of Richmond's, agreed to do so. The foursome drove to Becky's apartment at the Sands Motel. (R.T. at 430-84, 539-49.)

When Becky gave Richmond the $20 bill Crummett gave her, Richmond, who apparently had worked this scam before, palmed the bill and protested that Crummett had given her only $10. As Crummett opened his wallet to produce another $20, Becky saw that it was "loaded" and told Richmond. He told Becky they could not rob Crummett there because he could remember the location of the apartment. After Becky and Crummett retired to the bedroom, Richmond told Faith they were going to rob Crummett, but to say nothing. (Id. at 437, 540-41.)

When Becky and Crummett emerged from the bedroom, Richmond, under the guise of providing Crummett another opportunity to have relations with Becky, drove the quartet almost to the end of 22nd Street and turned the station wagon around. It was after midnight. (Id. at 437-39, 541.)

Richmond got out and snatched Crummett out the passenger door on the driver's side. Richmond knocked him down; when he tried to get up, Richmond knocked him down again. Richmond looked around for large rocks and, standing directly above Crummett, threw those down upon Crummett's head. (Id. at 439-42, 542.)

When Becky and Richmond finished rifling Crummett's pockets, they got back into the car. The testimony of the only eyewitness to the murder, Faith Erwin, was that Richmond drove the car over Crummett. (Id. at 434.) That first pass literally exploded Crummett's skull. Approximately 30 seconds later, Richmond drove over Crummett's torso as he left the scene.

Richmond and Becky collected about $45 and an engraved watch. Richmond considered the watch worthless because of the engraving and discarded it. They returned to Becky's apartment, divided the money, and Richmond and Faith Erwin fixed with heroin. (Id. at 542-44.)

Deputy Peterson discovered Crummett's body in the middle of the street about 5:00 a.m. the next day. There was a 2-inch diameter hole in the forehead. (Id. at 488-91.) Police also found two large pools of blood, one 30 feet west of the body, and the other right next to it flowing from Crummett's head. (Id. at 109-10.) Two bloody 4-inch diameter rocks lay 29 and 13 feet west of the body. (Id. at 120-22.) The left front wheel well, hubcap and much of

the left side of the undercarriage of the station wagon Richmond drove bore blood and hair similar to Crummett's. (Id. at 240-41, 256-64, 271-72.)

Ironically, John Diaz, Crummett's cousin, was working in the County Coroner's Office the morning of August 27, 1973. He lifted the sheet from the face of the "John Doe" but did not recognize his cousin. Only when he saw the shrapnel wounds to the legs did he suspect the cadaver might be Crummett. (Id. at 214-18, 225-28.)

The pathologist concluded that a tremendous force, probably the wheel of a car, crushed Crummett's skull. That injury caused death. Because the injuries to the chest and abdomen displayed no hemorrhaging, he opined they were inflicted at least 30 seconds later, after the heart ceased beating, by a force moving in the opposite direction. (Id. at 155-66, 195-210, 240-68.)

In a statement to police, Richmond admitted he planned the robbery, drove to the isolated locale, pulled Crummett from the car, and beat him to the ground; he blamed Becky Corella for running over Crummett. (Id. at 538-49.)

Sheila Dewey (aka Holt) stated that she knew that Richmond had been driving the car August 24 through 26, the period covering the murder. According to Sheila, Becky was so short that she had difficulty reaching the clutch and brakes. (Id. at 379-86.)

Deputy Barkman said that no one he asked knew anything about Becky Corella's being able to drive the car; Sheila Dewey told him that Corella tried to drive it but could not. (Id. at 276-77.) Officer Manricus saw Richmond driving the car August 30, 5 days after the murder. (Id. at 423-26.)

Defense counsel produced Regina Davis, who told the jurors that Faith Erwin told her that Becky Corella drove the car over Crummett. Upon cross-examination, however, Davis admitted that she did not tell police that when they questioned her December 12, 1973. (Id. at 633, 641.)

The First Sentencing and Appeal

After an aggravation-mitigation hearing, the trial court found that the state had proved two aggravating circumstances, A.R.S. § 13-703(F)(2) (conviction of an offense involving the use or threat of violence upon a person), and A.R.S. § 13-703(F)(6) (the defendant did commit the offense in an especially heinous and cruel manner). The basis for finding the first circumstance was Richmond's prior conviction for the armed kidnapping (involving the use of a knife) of Raul Granadas in 1970. (R.T. of Feb. 25, 1974, at 212.) The finding that "the defendant did commit the offense in an especially heinous and cruel manner" was a finding that Richmond killed Bernard Crummett. When the trial court considered possible

statutory mitigating circumstances, it rejected as non-existent A.R.S. § 13-703(G)(4),[1] which read as follows:

> The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

A.R.S. § 13-703(G)(4). The trial court's refusal to find the existence of this circumstance meant that the trial court decided that Richmond could reasonably have foreseen that his conduct would cause, or would create a grave risk of causing, death to another person. Finding two aggravating factors and insufficient mitigation to call for leniency, the trial court sentenced Richmond to death.

While the direct appeal was pending, Richmond sought post-conviction relief. He appended to his petition affidavits from two people who said that Becky Corella told them that she was driving the vehicle when it ran over Bernard Crummett. In response to that, the prosecutor filed an affidavit stating that, during the course of the trial, the prosecutor spoke to Becky Corella in Tucson. She became angry, professed her love for Richmond, and threatened to take the stand for the defense and take the blame for the

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1. At the time of the original sentencing in February, 1974, the aggravating and mitigating factors were found in A.R.S. § 13-454(E) and (F). The legislature has since changed the numbering of those statutes to A.R.S. § 13-703(F) (aggravating factors) and § 13-703(G) (mitigating factors).

murder. The prosecutor informed Edward Bolding, Richmond's trial counsel, during the state's case-in-chief, that Ms. Corella was at that time "willing to take the rap" for Richmond. Afterwards, the prosecutor saw Mr. Bolding speaking with Ms. Corella in a small private office at the courthouse. Despite her availability and apparent willingness to testify, defense counsel did not call her at trial, or at the sentencing. (Appendix B to this response, 1974 Affidavit of Prosecutor James Howard.)

The state's response to the first post-conviction petition also included the affidavit of Detective Morris Reyna. He spoke personally with Becky Corella in Los Angeles on November 2, 1974. She adhered to her original statement, that Richmond drove the car over Crummett, and disclaimed any contrary statements. Detective Reyna stated that Ms. Corella was available for service of a subpoena. (Appendix C1 to this Response, Detective Reyna's 1974 Affidavit.) Attached to Detective Reyna's affidavit were Rebecca Corella's original statement of September 3, 1973, in which she stated that Richmond ran over Bernard Crummett, and the transcribed statement from Daniel McKinney taken at the Arizona State Prison on November 6, 1974, in which he stated that Rebecca Corella told him that Richmond had driven the car over Crummett, but Richmond and Spencer Watson (another convicted murderer) had threatened McKinney's life unless McKinney testified otherwise in court. (Respondents' Appendix C2-9.)

The trial court denied the petition for post-conviction relief, and defense counsel consolidated review of that denial with direct appeal.

On the first appeal, a unanimous Arizona Supreme Court affirmed the conviction for murder and the denial of post-conviction relief. State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1976), cert. denied, 433 U.S. 915 (1977). The Arizona Supreme Court sustained the death penalty on one aggravating circumstance, the prior conviction for armed kidnapping. That court did not consider the especially heinous, cruel, or depraved circumstance because Richmond lacked sufficient mitigation to reduce the penalty to life. 114 Ariz. at 196-98, 560 P.2d at 51-53.

FIRST FEDERAL HABEAS PROCEEDING

In 1978 the United States District Court in Arizona granted Richmond's petition for writ of habeas corpus. That court upheld his conviction for first-degree murder, but ruled that the Arizona death penalty statute, as it stood at that time, was constitutionally infirm because it did not allow for consideration of relevant mitigating factors not specifically enumerated in the statute. Richmond v. Cardwell, 450 F. Supp. 519, 526 (D. Az. 1978). Meanwhile, the Arizona Supreme Court reached the same conclusion in State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied, 440 U.S. 924 (1970). The Arizona Supreme Court ordered Richmond resentenced in early 1979, but defense

counsel requested at least 10 continuances that pushed the resentencing into March 1980.

RESENTENCING AND SECOND APPEAL

After a 3-day aggravation-mitigation hearing, the trial court found that Richmond had been convicted of another first-degree murder.[2] (Richmond's Appendix D 2-3 attached to the Petition for Writ of Certiorari.) The trial court again found that Richmond had been convicted of a crime involving the threat of violence, the armed kidnapping. (Id.) The trial court again stated its conclusion that "the defendant did commit the offense in this case in an especially heinous and cruel manner." (Id. at D-3.) Moreover, as it did at the first sentencing, the trial court refused to find as a mitigating factor that Richmond could not have reasonably foreseen that his conduct would cause, or create a grave risk of causing, death to another person. (Id. at D-3, D-4.) Although the trial court found several mitigating factors, it was not persuaded that Richmond's alleged change of character, upon which defense counsel offered extensive testimony, was genuine. (Id. at D-5.)

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2. Richmond's conviction for the first-degree murder of Mary Dawson was affirmed by the Arizona Supreme Court in State v. Richmond, 112 Ariz. 228, 540 P.2d 700 (1975). Respondents know of no documentation in the state courts, or in the federal proceedings, to substantiate Richmond's allegation at page 10, footnote 5, of the petition that he was acquitted on a third murder charge because his defense was that Rebecca Corella committed the murder.

Because the state proved three aggravating factors, and Richmond could not produce substantial mitigation, the trial court, in compliance with the Arizona statute, imposed the death penalty.[3]

With one justice dissenting, four justices of the Arizona Supreme Court again upheld Richmond's death sentence. (Appendix C to the Petition.) Justice Feldman believed that Richmond's mitigation warranted reducing the penalty to life. (Appendix C to the Petition at C-13.) The five justices rejected the trial court's finding that Richmond committed the murder in an especially cruel manner. However, Justices Hays and Holohan believed that the gratuitous violence, exhibited by the second run over the victim's torso after the first run over his skull crushed it and killed him, and the needless mutilation of the victim warranted finding that Richmond committed the murder in an especially heinous manner. (Id.

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3. For the first time, Richmond complains that the element of violence in the kidnapping conviction was established only by the testimony of the victim, and that subsequent Arizona case law has held such testimony improper to establish an aggravating circumstance. (Petition for Certiorari at p.8.) He cites State v. Schaaf, ___ Ariz. ___, 819 P.2d 909, 919-20 (1991). He fails to note that Schaaf cites State v. Gillies, 135 Ariz. 500, 511, 662 P.2d 1007, 1018 (1983), cert. denied, 470 U.S. 1059, 105 S. Ct. 1775 (1985), appeal after remand, 142 Ariz. 564, 691 P.2d 655 (1984). Gillies was decided 2-1/2 months before the Arizona Supreme Court issued its opinion on Richmond's second appeal and 4 months before the Arizona Supreme Court denied his motion for rehearing. State v. Richmond, 136 Ariz. 312, 666 P.2d 57, cert. denied, 464 U.S. 986 (1983). He did not challenge the use of the kidnapping conviction as an aggravating factor in his third state post-conviction petition (filed after the second appeal), in the district court, or before the Ninth Circuit.

at 8.) Justices Cameron and Gordon disagreed with the finding of heinousness, but they agreed that the death penalty was appropriate because of Richmond's record for violent crimes, particularly the other first-degree murder conviction. (Id. at 11-13.)

Because this Court's decision in Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982), came down after Richmond was resentenced, but before the Arizona Supreme Court considered his appeal, the Arizona Supreme Court took great care to discuss why Enmund did not prevent imposition of the death penalty. That court noted that Richmond planned the robbery, drove the victim into the desert, pulled him from the car, and knocked him unconscious to rob him. Faith Erwin's testimony, and appellant's own statements admitted at trial, demonstrated that he threw large rocks at the victim after he knocked him to the ground. The state's evidence showed that Richmond drove the vehicle over the victim and killed him. The Arizona Supreme Court pointed out that the circumstantial evidence supported Faith Erwin's testimony. 136 Ariz. at 317-18, 666 P.2d at 62-63. In the alternative, the Arizona Supreme Court said that, even if that court accepted Richmond's contention that he was not driving the car, the demands of Enmund were still satisfied because of Richmond's leadership, concoction of the plan to rob, his use of violent force, his awareness that the victim, if allowed to live, could identify him, and his willingness to leave the wounded and unconscious victim alone

in the desert to an uncertain fate. (Id.) With no dissents, on this point, the Arizona Supreme Court finished its examination of the Enmund question with the following statement: "The evidence in this case shows that appellant intended to take a life." 136 Ariz. at 318, 666 P.2d at 63.

THE SECOND FEDERAL HABEAS CORPUS

In 1984, Richmond's attorneys filed a second petition for writ of habeas corpus in the district court. The district court twice summarily denied relief, but the Ninth Circuit remanded the case both times. The third time, the Honorable Alfredo Marquez, in a lengthy opinion, rejected all challenges and denied relief. Richmond v. Ricketts, 640 F. Supp. 767 (D. Ariz. 1986). The parties briefed the issues and the Ninth Circuit heard oral argument before this Court handed down Walton v. Arizona, 497 U.S. ___, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), and Lewis v. Jeffers, 497 U.S. ___, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990). The Ninth Circuit ordered supplemental briefing to consider the effect of Walton and Jeffers, and heard a second oral argument. A unanimous panel issued the opinion on December 26, 1990, which the panel has twice amended slightly. The panel unanimously rejected the petition for rehearing and the suggestion for rehearing en banc; of 28 active judges, only four dissented from the denial of rehearing en banc.

REASONS FOR DENYING THE WRIT

Richmond concedes that this Court's decision in Walton v. Arizona makes it clear that the Arizona Supreme Court has

developed a sufficiently narrowing construction of the especially heinous, cruel or depraved circumstance to withstand constitutional scrutiny, and that the Arizona Supreme Court itself may apply that narrowing construction even if the trial court failed to. (Petition at p.16.) Equally important, this Court's decision in Lewis v. Jeffers restricts a federal court's review of a state court's finding of an aggravating factor to whether any rational fact-finder, viewing the evidence in the light most favorable to the state, could have found the circumstance to exist. Nonetheless, Richmond urges this Court to grant certiorari for two reasons.

Ignoring the fact that both the trial court and the Arizona Supreme Court found two other aggravating circumstances, either of which required the imposition of the death penalty unless Richmond produced substantial mitigation, Richmond focuses upon the especially heinous circumstance found by only two of the four justices who believed that the death penalty was appropriate. He contends that those two justices could not have found that factor because neither the Arizona Supreme Court, nor the trial court, determined who drove the car over the victim. The record indicates that the trial court and the Arizona Supreme Court did determine that Richmond drove the vehicle over Bernard Crummett; the Ninth Circuit panel that studied the record properly limited its review to whether any rational

fact-finder could have found the especially heinous circumstance applicable.

Richmond also contends that certiorari should be granted to determine whether a federal court may ignore a state court's determination that the state statute requires a weighing of aggravating and mitigating factors against one another. That misstates the question. The question, as the panel in this case correctly and unanimously concluded, is whether the Constitution forbids the imposition of the death penalty upon the basis of two unchallenged aggravating factors, either of which under the Arizona statute required the death penalty, even if a third factor, found by only two of the four justices who voted for death, might arguably have been improperly found. Under such circumstances, the Constitution does not require a state supreme court to remand for a new sentencing.

I

THIS COURT SHOULD DENY CERTIORARI BECAUSE BOTH THE TRIAL COURT AND THE ARIZONA SUPREME COURT DID DETERMINE THAT RICHMOND DROVE THE CAR OVER BERNARD CRUMMETT AND A RATIONAL FACT-FINDER, UNDER THE CIRCUMSTANCES OF THIS CASE, COULD HAVE FOUND THE ESPECIALLY HEINOUS FACTOR APPLICABLE.

Richmond makes four points that, according to him, impair his death penalty: (1) the sentencing decision in this case "rested on the determination that the crime for which petitioner was convicted was especially heinous and cruel"; (2) the two justices who found the especially heinous factor

may not have applied it properly; (3) even if the Ninth Circuit was correct in concluding that a rational fact-finder could have found the especially heinous factor, that conclusion can not be sustained because no one ever determined who drove the car over the victim; and (4) although the Arizona Supreme Court apparently did decide that Richmond drove the care over Bernard Crummett, that court supposedly was incapable of making that determination because of conflicting evidence. (Petition for Certiorari at pp. 7-23.) Richmond relies in part on the dissent of four justices from the denial of rehearing en banc. None of those justices was on the panel that studied the full record in this case. The panel decision was unanimous.

Richmond's first error is stating that the sentencing decision in this case rested on the determination that his crime was especially heinous. (Petition for Certiorari at 17.) The sentencing decision in this case involved the unchallenged finding of two other aggravating circumstances, one involving the threat of violence during an armed kidnapping, and the other involving a separate conviction for another first-degree murder. Only two of the five justices of the Arizona Supreme Court found the especially heinous factor applicable, while none of the five found the murder to be especially cruel. For that reason, the district court held that Richmond had no standing to challenge the constitutionality of the circumstance because a majority of the Arizona Supreme Court found it not to exist and

did not base the sentence of death upon it. Richmond v. Ricketts, 640 F. Supp. 767, 795-96 (D. Ariz. 1986).

Richmond does not appear to challenge the limiting construction of the especially heinous factor applied by Justices Hays and Holohan. However, because he did so below in the briefs to the Ninth Circuit, respondents set forth here in full the facts upon which those two justices based their conclusion:

> "Heinous" has been defined as "hatefully or shockingly evil; grossly bad," and "depraved" is "marked by debasement, corruption, perversion or deterioration." State v. Knapp, supra. Heinous and depraved involve the mental state and attitude of the offender as reflected in his words and actions. State v. Gretzler, supra; State v. Poland, supra; State v. Lujan, supra. In Gretzler, supra, we discussed factors which lead to a finding of heinousness or depravity. One factor is the infliction of gratuitous violence on the victim; another related factor is the needless mutilation of the victim. Here the victim was already unconscious and bleeding when he was run over not once, but twice, each time from a different direction. The evidence indicates that the first run by the vehicle was over the victim's head crushing his skull and killing him. The second run of the vehicle was over the body of the victim. The investigating officers found, at the location of the murder, two large pools of blood separated by about 30 feet, which was consistent with the body having been run over and dragged to where it was found. Again the fact that the victim in the instant case was run over twice and his skull was crushed, we find to be a ghastly mutilation of the victim.

> The presence of any one of the three elements - cruel, heinous, or depraved - is sufficient to constitute an aggravating circumstance. State v. Bishop, 127 Ariz. 531, 622 P.2d 478 (1980). We believe the facts of this case set it "apart from the normal first degree murders." State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979). The trial court was correct in finding the offense was committed in an especially heinous manner. It is also evident that the trial court could have found that the offense was committed in an especially depraved manner.

State v. Richmond, 136 Ariz. at 319, 666 P.2d at 64.

The Ninth Circuit recognized that this Court in Walton v. Arizona upheld the constitutionality of Arizona's especially heinous, cruel or depraved circumstance on the basis of the limiting construction the Arizona Supreme Court had applied. (Appendix A to this Response at 19-21.) Rejecting Richmond's assertion that the two justices did not apply a sufficiently limiting construction in his case, the Ninth Circuit cited from the Arizona Supreme Court opinion the same passage respondents have cited above. (Id. at 21-22.) Cognizant of the restrictions placed upon federal review by this Court's decisions in Walton and Lewis, the Ninth Circuit applied the reasonable fact-finder standard of Lewis v. Jeffers to the especially heinous circumstance found by two state justices. (Id. at 23-26.) That court concluded that, under the definition applied by the Arizona Supreme Court, a rational fact-finder "could indeed have found Crummett's murder heinous or depraved so as to warrant the penalty of death." (Id. at 26.)

Not directly questioning that conclusion, Richmond takes a different tact. He blends an Enmund question with the applicability of the especially heinous factor. He says that, even assuming the panel was correct in its conclusion that a rational fact-finder could have found A.R.S. § 13-703(F)(6) applicable, none of the Arizona justices could have done that because they never resolved the factual predicate for applying the limiting construction to the facts of this case, i.e., who caused the victim's death? (Petition for Certiorari at pp.20-21.)

Respondents have pointed out that, at both the original sentencing and the resentencing, the trial court found the existence of the especially heinous circumstance. In making that finding, the trial court stated that "The defendant did commit the offense in an especially heinous and cruel manner." Because the only offense to which that circumstance applied was first-degree murder, the trial court clearly was saying that Willie Lee Richmond committed the murder. One cannot commit an offense in a particular manner unless one commits the offense. On the second appeal after resentencing, the Arizona Supreme Court noted the trial court's finding of the especially heinous factor, and that court's conclusion that the defendant committed the offense. 136 Ariz. at 319, 666 P.2d at 74.

Performing its independent review, the Arizona Supreme Court considered whether Enmund v. Florida prohibited

imposition of death. First, that court noted that Richmond masterminded the plan to rob Bernard Crummett, drove the station wagon into the desert, pulled Crummett from it and knocked him to the ground. Then, according to Faith Erwin's trial testimony and Richmond's own statements admitted at trial, Richmond picked up large rocks and threw them at the victim's head. The bloody rocks found at the scene, and the nature of some of the wounds to Crummett's head, corroborated Erwin's testimony and Richmond's admissions. 136 Ariz. at 318, 666 P.2d at 63. The Arizona Supreme Court then said the following:

> Even if we accept appellant's contention that he was not driving the car when the victim was run over, we do not believe this case falls within the parameters of Enmund. The facts from the appellant's version indicate that he was the leader of the group; he was the first to use violent force on the victim; he was aware that the victim, if allowed to live, could identify him. Appellant, from his version of the facts, was willing to leave the wounded and unconscious victim alone in the desert to an uncertain fate. Appellant contends that Becky Corella was the one who drove the car over the victim. There is no evidence that appellant protested or showed any emotion when the victim was twice run over. The appellant's version of the facts indicates appellant played an integral part in the events which caused the victim's death, and he willingly assisted in the acts which were intended to cause the victim's death.
>
> The evidence presented by the state was that the appellant drove the vehicle over the victim, thus killing him. The testimony of Faith Erwin was that the appellant was the driver at the time the victim was run over. The circumstantial evidence supports Faith's testimony. The circumstances show that appellant was the driver when the group left for the desert. The other woman, Becky Corella, was so short in stature that it was difficult for her to operate an automobile. Appellant was the leader of the group and directed the operation. With such support we believe the trial judge was justified in concluding that appellant drove the vehicle that was used to kill the victim.
>
> Under either version of the facts appellant does not fit within the sphere of defendants the Enmund court seeks to protect from capital considerations. The evidence in this case shows that appellant intended to take a life.

136 Ariz. at 318, 666 P.2d at 63 (emphasis supplied). It is difficult to conceive how the Arizona Supreme Court could have stated more emphatically that its review of the record indicated that the trial judge did conclude that Richmond drove the vehicle over Crummett, and that the Arizona Supreme Court itself was persuaded that the evidence showed that Richmond intended to take a life.[4] Respondents remind the Court that, at both sentencings, the trial court specifically rejected the mitigating circumstance found in A.R.S. § 13-703(G)(4). That meant the trial court rejected any contention that Richmond could not reasonably have foreseen that his conduct would cause, or would

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4. The Ninth Circuit noted that the Arizona Supreme Court's findings also satisfied Tison v. Arizona, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987). Having beaten Crummett unconscious, Richmond left him in the street at night, indifferent to his fate. (Appendix A to this response at 31-33.) At p.14, footnote 6, in his opening brief to the Ninth Circuit, Richmond conceded that his trial counsel presented testimony that at least six to eight cars drove down that street between the time Crummett was murdered and police discovered his body at 5 a.m. Defense counsel was trying to show that some other car might have run over Crummett. That only served to highlight Richmond's reckless indifference to human life, a mental state this Court held in Tison, sufficient to warrant the death penalty.

create a grave risk of causing, death to another person. That the trial court did not explicitly say "This Court finds that Willie Richmond drove the car over Bernard Crummett" is immaterial. None of that detracts from the trial court's clear findings, one in aggravation, and one in rejection of mitigation, that Richmond "did commit the offense in an especially heinous and cruel manner" and "could reasonably have foreseen that his conduct would cause the death of another person."

Even if the trial court had made no finding about who was driving the car, the Arizona Supreme Court was free to do that under this Court's decision in Cabana v. Bullock, 474 U.S. 376, 106 S. Ct. 689, 88 L. Ed. 2d 704 (1986). Here, as below, Richmond attempts to avoid Cabana by saying that, whenever there is a conflict in the evidence, the state appellate court cannot resolve that conflict but must remand to the trial court. Any passing allusion to that in Cabana was dictum, not part of the holding. The only eyewitness who ever testified under oath at any proceeding, Faith Erwin, said that Willie Lee Richmond drove the car over Bernard Crummett. Although Becky Corella was available to testify at trial, defense counsel did not call her, nor did he call her at the original sentencing. That was probably because of the affidavits of the prosecutor and Detective Reyna submitted in November 1974, indicating that Corella was available to testify and that she would stick by her original statement that Richmond drove the car over Crummett. (Appendices B and C to this Response.) At the mitigation hearing

preceding the resentencing, Regina Collins (formerly Davis) said that Faith Erwin told her that Becky was driving. On cross-examination, however, Regina admitted that Faith never said anything about a man being run over, and that some of the things to which Regina was testifying could be due to "some things that I have heard or that had been planted in my mind." (R.T. of Mar. 12, 1980, at 60, 70.) Daniel McKinney testified at the resentencing that Becky Corella told him that she drove the station wagon over Crummett, but the state impeached him thoroughly with a previous statement he gave to police in which Richmond admitted to him having driven the station wagon over Crummett, and sent him word in prison that Richmond and Spencer Watson (another convicted murder) would kill McKinney if McKinney did not testify that Becky Corella ran over Crummett. (Id. at 116-24.) Although the prosecution went to considerable effort to locate both Faith Erwin and Becky Corella, the only eyewitnesses to the murder, and defense counsel stipulated on the record that the prosecutor had provided him with their locations, defense counsel called neither woman at the resentencing. (R.T. of Mar. 11, 1980, at 29-30.) Thus, no eyewitness to the murder ever testified under oath in contradiction of Faith Erwin's trial testimony. It seems more than a fair inference that the refusal of two different defense attorneys, at the first sentencing and at resentencing, to call either Corella or Erwin was due to lack of confidence that either woman would have said that Richmond was not driving the car.

Respondents have previously pointed out that other evidence at trial strongly corroborated Faith Erwin's testimony. For instance, Sheila Dewey (a/k/a Holt) stated that she knew that Richmond had been driving the station wagon from August 24 to August 26, the period covering the murder. According to Sheila, Becky Corella was so short, that she had difficulty reaching the clutch and the brakes. (R.T. at 379-86.) Deputy Barkman said that no one he asked knew anything about Becky Corella's being able to drive the station wagon; Sheila Dewey told him that Corella could not drive it. (Id. at 276-77.) Officer Manricus saw Richmond driving the car on August 30, 5 days after the murder. (Id. at 423-26.) This testimony prompted the Arizona Supreme Court to observe in its opinion after resentencing that the circumstantial evidence supported Faith Erwin's testimony. 136 Ariz. at 318, 666 P.2d at 63.[5]

With that kind of evidence in the record, it is ridiculous to maintain that the Arizona Supreme Court could not independently determine that Richmond drove the station wagon over Crummett. Having considered the Enmund challenge, the Ninth Circuit concluded that "The Arizona Courts have predicated Richmond's sentence upon a sufficient finding of criminal intent."

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5. This Court noted in Lewis v. Jeffers that state court findings of aggravating factors often require a sentencer to "resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." 110 S. Ct. at 3103, quoting Jackson v. Virginia, 443 U.S. at 319, 99 S. Ct. at 2789.

(Appendix A to this Response, at 33.) Richmond cannot demonstrate, from a fair reading of the entire record, that no rational fact-finder, viewing the evidence in the light most favorable to the state, could have found the especially heinous circumstance to exist, nor can he establish that the Arizona courts did not make a finding that he killed and intended to kill.

II

EVEN IF THE ESPECIALLY HEINOUS FACTOR WERE ELIMINATED, NOTHING IN CLEMONS V. MISSISSIPPI OR THE PRACTICE OF THE ARIZONA SUPREME COURT IN ITS REVIEW OF CAPITAL CASES WOULD REQUIRE A REMAND FOR RESENTENCING BECAUSE THE TWO REMAINING, UNCHALLENGED AGGRAVATING CIRCUMSTANCES, AND RICHMOND'S FAILURE TO ESTABLISH SUFFICIENT MITIGATION, JUSTIFY THE DEATH PENALTY.

Richmond maintains that the Ninth Circuit misunderstood the procedure utilized by the Arizona Supreme Court in that court's review of capital cases. He implies that, because it is the Arizona Supreme Court's usual practice to remand a case for resentencing when it eliminates an aggravating circumstance, that the Arizona Supreme Court should have done that in his case because three of the five justices did not agree that the especially heinous circumstance applied. The real constitutional question, however, is whether there is any prohibition against a state supreme court's affirming the death penalty without remanding to the trial court when the state supreme court upholds two other valid aggravating circumstances.

Below, Richmond relied upon the Ninth Circuit's en banc decision in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988), to argue that invalidation of any aggravating circumstance required a remand for resentencing. (Appendix A to this Response at 28.) The panel, reading Adamson correctly, noted that Adamson merely stated that it was the common practice of the Arizona Supreme Court to remand when that court invalidated an aggravating circumstance. (Id.) Nothing in Adamson suggested that the United States Constitution required a remand. (Id.)

Although the Arizona Supreme Court may remand when it eliminates an aggravating circumstance, it reserves the discretion to determine whether the remaining aggravating circumstances justify the imposition of the death penalty without remanding to the trial court. State v. Brewer, CR-88-0308-AP (Ariz. Sup. Ct., Jan. 28, 1992) (elimination of one of two aggravating circumstances did not necessitate a remand for resentencing or impair the death penalty); State v. Correll, 148 Ariz. 468, 715 P.2d 721 (1986) (elimination of one of four aggravating circumstances did not require remand); State v. McCall, 139 Ariz. 147, 677 P.2d 920 (1983), cert. denied, 467 U.S. 1220 (1984) (elimination of one of three aggravating circumstances did not require a remand); State v. Jeffers, 135 Ariz. 404, 661 P.2d 1105, cert. denied, 464 U.S. 865 (1983) (elimination of one of two aggravating circumstances did not require a remand); State v. Blazak, 131

Ariz. 598, 643 P.2d 694, cert. denied, 459 U.S. 882 (1982) (elimination of one of five aggravating circumstances did not require remand); State v. Ortiz, 131 Ariz. 195, 639 P.2d 1020 (1981), cert. denied, 456 U.S. 984 (1982) (elimination of one of three aggravating factors did not require resentencing); State v. Clark, 126 Ariz. 428, 616 P.2d 888, cert. denied, 449 U.S. 1067 (1980) (elimination of one of three aggravating circumstances did not require resentencing). In this case, as in every capital case, the Arizona Supreme Court made an independent examination of the entire record to determine the existence of aggravating and mitigating circumstances, the weight to give each, and the propriety of the death penalty. The Arizona Supreme Court explicitly stated that it was making that kind of a review in this case. State v. Richmond, 136 Ariz. at 320, 666 P.2d at 65.

Two of the four justices who believed that the death penalty was properly imposed did not find the existence of the especially heinous factor. Nonetheless, in their independent evaluation of aggravation and mitigation, Justices Cameron and Gordon believed that Richmond's prior record of violent crimes, a conviction for armed kidnapping and another separate conviction for first-degree murder, warranted the death penalty. State v. Richmond, 136 Ariz. at 323-24, 666 P.2d at 68-69. Richmond argues that because the other two justices who voted for the death penalty believed that the crime was also especially heinous (a

mistake, in Richmond's estimation) the Arizona Supreme Court could not affirm the death penalty, but was obliged to remand to the trial court for resentencing. There are three flaws in Richmond's reasoning: (1) failure to properly evaluate the nature of the Arizona statute; (2) a mistaken reading of this Court's decision in Clemons v. Mississippi, 44 U.S. ___, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990); and (3) failure to take into account this Court's decision in Barclay v. Florida, 463 U.S. 939, 103 S. Ct. 3418, 77 L. Ed. 2d 1134 (1983).

In Arizona, one aggravating circumstance mandates the death penalty unless the defendant can produce substantial mitigation. A.R.S. § 13-703(E). This Court upheld that statute in Walton v. Arizona, 110 S. Ct. at 3056. This is a fundamental and radical distinction from the statutes in Clemons and Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983). Aggravating circumstances in Georgia merely make the defendant eligible for the death penalty, they do not determine punishment. Clemons v. Mississippi, 110 S. Ct. at 1446. In Mississippi, on the other hand, the finding of aggravating factors is part of the sentencing determination. Id. However, unlike Arizona, the Georgia and Mississippi statutes do not require imposition of the death penalty if an aggravating circumstance is found. To the contrary, the Georgia and Mississippi statutes allow the sentencers, the jurors in those states, to decline to

impose the death penalty, regardless of the number of aggravating factors proved or the lack of mitigation. Zant v. Stephens, 462 U.S. at 871-72, 103 S. Ct. at 2740 (the sentencer has absolute discretion not to impose death); Clemons v. Mississippi, 110 S. Ct. at 1445 (the trial court instructed the jurors several times that they need not sentence Clemons to death even if they found no mitigating circumstances). The panel that decided Richmond's case was quite aware of the distinction between the Arizona statute and the Mississippi statute in Clemons. (Appendix A to this Response at 29.)

Clemons v. Mississippi does not require resentencing when the state supreme court eliminates an aggravating circumstance:

> [T]he state court in this case, as it had in others, asserted its authority under Mississippi law to decide for itself whether the death sentence was to be affirmed even though one of the two aggravating circumstances on which the jury had relied should not have been or was improperly presented to the jury. The court did not consider itself bound in such circumstances to vacate the death sentence and to remand for a new sentencing proceeding before a jury. We have no basis for disputing this interpretation of state law . . . .

Clemons v. Mississippi, 110 S. Ct. at 1447 (emphasis supplied). This Court remanded Clemons to the Mississippi Supreme Court because this Court could not tell whether the Mississippi Supreme Court reweighed the remaining valid aggravation against the mitigation without considering the

admittedly unconstitutional circumstance, or applied harmless error review to uphold the death sentence. 110 S. Ct. at 1444. There is another crucial distinction between the aggravating circumstance in Clemons and Arizona's especially heinous circumstance. This Court noted at the beginning of its opinion in Clemons that the jury instruction about the especially heinous, atrocious or cruel circumstance "was constitutionally invalid in light of our decision in Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988)." 110 S. Ct. at 1444. By contrast, this Court has upheld the Arizona Supreme Court's limiting construction of the especially heinous, cruel or depraved circumstance. Walton v. Arizona.

Appreciating the significant distinctions between the Arizona statute and the statute in Clemons, the Ninth Circuit rejected the argument that elimination of one aggravating factor would necessitate a remand:

> Elimination of the challenged factor would still leave enough support for Richmond's sentence because the statute at issue here is fundamentally different from the statute at issue in Clemons. The Mississippi law that Clemons considered authorizes the death penalty if "'there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances.'" Id. at 1446 n.2 (quoting Miss. Code Ann. § 99-19-101(3)(c) (Supp. 1989)) (emphasis added). Arizona's law mandates the death penalty "if the court finds one or more of the [enumerated] aggravating circumstances . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency." Ariz. Rev. Stat. Ann. § 13-703(E) (emphasis added). The difference is significant: a conclusion by the Arizona courts that there are no substantial mitigating circumstances is separate from and independent of any conclusion regarding the existence of aggravating circumstances. Invalidation of an aggravating circumstance does not mandate reweighing or require resentencing where the court has found that the prosecution has met its burden of establishing aggravation sufficient to warrant the state's harshest penalty two or three times and that the defense has failed to establish mitigating circumstances sufficiently substantial to call for leniency. See id. §§ 13-703(C), (E). Under the statute at issue in Clemons, the invalidation of an aggravating circumstance necessarily renders any evidence of mitigation "weightier" or more substantial in a relative sense; the same, however, cannot be said under the terms of the Arizona statute at issue here. Nothing in the Arizona statute suggests the need for plenary reweighing where the record still reveals that there are "one or more of the [enumerated] aggravating circumstances . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency." Id. § 13-703(E).

(Appendix A to this Response at pp.29-30; emphasis supplied.)

Although Richmond's contention that resentencing is necessary in this case turns on the erroneous assumption that no rational fact-finder could have found the especially heinous circumstance applicable, an assertion rejected by the Ninth Circuit, even if he were right, the Constitution still would not require resentencing. In Zant v. Stephens, this Court said that one of the factors to consider in determining the propriety of a death sentence based in part upon an admittedly unconstitutionally vague circumstance was the reason that circumstance was held invalid. 462 U.S. at 864,

103 S. Ct. at 2736. Although the Georgia Supreme Court, prior to considering Stephens, had declared unconstitutionally vague the statutory aggravating circumstance concerning "a substantial history of serious assault and criminal convictions," that court upheld Stephens' death penalty based on two other aggravating circumstances, and this Court affirmed. In affirming, this Court noted that the Georgia Supreme Court said that it might have reached a different conclusion if the evidence received by the jurors had been improper or some other arbitrary factor had entered into the sentencing decision. However, the Georgia Supreme Court said that the evidence of Stephens' prior assaultive behavior was properly received by the jurors and could properly have been considered. 462 U.S. at 873, 103 S. Ct. at 2740. This Court accepted that reasoning and found, as an additional safeguard against arbitrary imposition of the death penalty, the Georgia Supreme Court's review of the record and the death penalty to determine whether the sentence was arbitrary or disproportionate. 462 U.S. at 876, 103 S. Ct. at 2742. This Court noted that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition, but the Constitution does not require the sentencer to ignore other possible aggravating factors in the process of selecting those who will actually be sentenced to death. 462 U.S. at 878, 103 S. Ct. at 2743.

The Arizona statute requires the sentencer to consider any evidence relating to aggravation or mitigation that was introduced at trial. A.R.S. § 13-703(C). Thus, there was absolutely nothing improper in the consideration by two Arizona justices of the facts at trial demonstrating the gratuitous violence inflicted upon Bernard Crummett, two passes over his body from different directions after the first pass killed, or the needless mutilation of his body. Richmond has never argued that the sentencer could not consider these facts, nor could he reasonably do so. His argument is that the two Arizona justices could not consider these facts as a statutory aggravating circumstance. Even if he were right, the Constitution and this Court's cases would not have forbidden those two justices from considering the manner in which Richmond murdered. Because two other unchallenged aggravating circumstances fully support the death penalty, and the two justices who found the especially heinous factor considered nothing impermissible or unconstitutional, the Constitution does not require a resentencing.

The conclusion above is strengthened by this Court's decision in Barclay v. Florida, 463 U.S. 939, 103 S. Ct. 3418, 77 L. Ed. 2d 1134 (1983), decided the same year as Zant v. Stephens. The trial judge, a veteran of World War II, found that Barclay's extensive criminal record was an aggravating circumstance. 463 U.S. at 944, 103 S. Ct.

at 3422. The State of Florida conceded before this Court that, under Florida law, a defendant's prior criminal record is not a proper aggravating circumstance. Id. at 946, 103 S. Ct. at 3423. In addition, Barclay complained that the trial judge added a second improper aggravating factor by discussing the racial motive for the murder and comparing it with the judge's experience in World War II when he saw Nazi concentration camps. Id. at 948-49; 103 S. Ct. at 3424. This Court rejected both contentions. Even though the trial court's finding of Barclay's criminal record as a non-statutory aggravating circumstance violated Florida law, nothing in the Constitution prohibited the trial court from considering that criminal record or the racial motive. 463 U.S. at 956, 103 S. Ct. at 3428. By the same token, nothing in the Constitution prevented two Arizona justices from considering the properly admitted trial evidence about the gratuitous violence and needless mutilation inflicted upon Bernard Crummett from two passes of the car over his body.

CONCLUSION

The Ninth Circuit has correctly applied this Court's decisions in Walton v. Arizona and Lewis v. Jeffers, and properly performed its limited review. Willie Lee Richmond has had the benefit of two sentencings, two direct appeals, three state post-conviction petitions, and two federal habeas corpus proceedings. He has had every opportunity to present any valid reason why the death penalty should not be upheld. This August will mark the 19th year since Richmond killed Bernard Crummett and, on a separate occasion, Mary Dawson. Respondents respectfully ask this Court to bring this case to a conclusion by denying certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

HC 5-18
RICHMOND

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIE LEE RICHMOND, *Petitioner-Appellant,* v. SAMUEL A. LEWIS,* Director, Arizona Department of Corrections; and ROGER CRIST, Superintendent of the Arizona State Prison, *Respondents-Appellees.*	No. 86-2382 D.C. No. CV-84-010-T-ACM ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Arizona
Alfredo C. Marquez, District Judge, Presiding

Argued and Submitted September 18, 1987
Submission Vacated September 22, 1987
Reargued and Submitted September 27, 1990
San Francisco, California

Filed December 26, 1990
Amended January 14, 1992

Before: Arthur L. Alarcon and Diarmuid F. O'Scannlain, Circuit Judges, and Albert Lee Stephens,** District Judge.

Opinion by Judge O'Scannlain

*Samuel A. Lewis and Roger Crist have been substituted for their respective predecessors in office, James R. Ricketts and Donald Wawrzaszek, pursuant to Federal Rule of Appellate Procedure 43(c)(1).

**The Honorable Albert Lee Stephens, United States District Judge for the Central District of California, sitting by designation.

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OPINION

O'SCANNLAIN, Circuit Judge:

Willie Lee Richmond, who was sentenced to death upon conviction of first-degree murder in Arizona state court, appeals from the district court's denial of his petition for habeas corpus. He contends that imposition of capital punishment will violate his rights under the sixth, eighth, and fourteenth amendments. We now affirm.

I

A

This case arises from Richmond's conviction in 1974 for first-degree murder in the death of Bernard Crummett. On an August evening seventeen years ago, the victim met Rebecca Corella, a nude dancer, at the Bird Cage Bar in Tucson, Arizona. After leaving the bar, the pair met Richmond in the bar's parking lot where Corella attempted to persuade Richmond to allow his fifteen-year-old girlfriend, Faith Erwin, to prostitute herself with Crummett. Richmond and Erwin refused, and after a brief conversation, Corella agreed to have

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sex with Crummett herself. Crummett thereupon produced a twenty-dollar bill, which Corella handed to Richmond and which Richmond palmed and surreptitiously exchanged for a ten. A brief argument ensued as Richmond and Corella insisted that Crummett had only given them ten dollars.

Crummett eventually yielded and agreed to pay more. As he reached into his wallet a second time, Corella observed what seemed a considerable amount of cash, and she communicated her observation to Richmond. All four individuals then proceeded in a borrowed station wagon to Corella's motel-room apartment. There, just as Corella and Crummett emerged from the bedroom, Richmond whispered to Erwin his intention that they rob Crummett, explaining that they should not commit the crime in the apartment because Crummett might remember the surroundings.

The group then left the motel and with Richmond as their driver proceeded to the end of a road on the outskirts of Tucson. Richmond thereupon stopped the car, and either Richmond or Corella — the testimony conflicts — told Crummett to get out because the car had suffered a flat tire. Richmond then assaulted Crummett, beating him with his fists and knocking Crummett to the ground. As Crummett lay motionless, Richmond pelted him with rocks. Corella, meanwhile, grabbed Crummett's wallet. According to Erwin, who admitted that she was vomiting and "coming down" from heroin during the incident, the following events then transpired:

> Q. [Mr. Howard, Prosecutor]
> Then what happened?
>
> A. [Erwin]
> Well, they all got in the car, and Becky [Corella] was getting the wallet and what else, you know. I looked over to see what else was taken. And Becky [Corella] was getting the wallet and we came in the car and left.

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Q. And where did you go from there?

A. Back to the Sands Motel.

Q. Did you run over anything?

A. Yes, a man. It was a bump, after we were leaving.

Q. After you felt that bump, was anything said in the car when you felt that bump?

A. Becky [Corella] said, it felt like a man's body.

Q. Who was driving the car?

A. Willy [sic].

Under cross-examination, Erwin stood by her contention that Richmond had been the driver at the time the car ran over Crummett. She admitted, however, that she was suffering greatly under the influence of her drug injections at the time and that she was lying back on the car seat with her eyes closed.

The police found Crummett's body at five o'clock the following morning. The examining pathologist testified at trial that the body exhibited signs of three forms of extreme force. First, there were wounds and indentations in the head consistent with a contention that the victim had been pummeled with rocks. In conjunction with this observation, he noted that several blood-stained rocks were found in the immediate vicinity of the body. Second, he testified that the victim's head had suffered severe trauma and "bursting" from a crush injury most probably attributable to an automobile tire. He identified this second injury as the probable cause of death. Third, he testified to the presence of a second crush injury along the trunk and the abdominal section. This too the

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pathologist attributed to an automobile tire, which impacted the body from th. opposite direction at least thirty seconds after the fatal blow. He concluded, therefore, that the victim was twice run over — once while alive but presumably unconscious and a second time after death. A police detective also testified to the discovery of human blood and hair on the undercarriage of the recovered station wagon.

Shortly after the night of Crummett's death, Richmond was arrested on two unrelated murder charges. As he awaited proceedings on those charges in jail, he was served with an arrest warrant for the murder of Crummett, and he agreed to waive his rights and make a statement at that time. Although he admitted to robbing and beating Crummett, he claimed that he was not the driver when Crummett was run over. In his statement, which was taped and played at trial, Richmond insisted:

> I opened the door. I snatched the dude out by his collar, and bam, he falls straight out. I wanted to go through his pockets, but she [Corella] was already going through his pockets and he was getting up and I reached down and punched him again. So my old lady, Faith [Erwin], she couldn't take it. She got out of the car and she looked and she started crying, you know. And about that time I am looking at her, and going through his change. And this rock, you know, like that, and dip, dip like that, you know. And I said, wow, to myself, you know. Come on let's get in the car and me and her [Erwin] get in the car, and I am talking to her [Erwin] and Rebecca [Corella] gets in the car and she backed up and she throws up in gear and comes back over. And we were going on down further and she was all over the fucking road, and said, give me this mother-fucking car and let me drive, you know.

At the conclusion of the evidentiary phase of the trial, the judge instructed the jury that Richmond could be convicted of

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first-degree murder upon either a finding of premeditation or a felony-murder theory:

> Murder is the unlawful killing of a human being, with malice aforethought.
>
> • • • •
>
> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs as a result of the perpetration of, or attempt to perpetrate, the crime of robbery and where there was in the mind of the perpetrator the specific intent to commit such crime, is murder of the first degree.
>
> • • • •
>
> If a human being is killed by any one of several persons engaged in the perpetration of, or attempt to perpetrate, the crime of robbery, all person[s] who either directly and actively commit the act constituting such crime or who knowingly and with criminal intent aid and abet its commission or, whether present or not, who advise and encourage its commission, are guilty of murder in the first-degree, whether the killing is intentional, unintentional, or accidental.

Upon these and other instructions, the jury found Richmond guilty of first-degree murder on February 5, 1974.[1]

[1]On August 9, 1974, Richmond was convicted of first-degree murder on one of the two unrelated charges and sentenced to life imprisonment. "It is not disputed that the killing that was the basis of th[at] conviction occurred prior to the murder of Bernard Crummett." *Richmond v. Ricketts*, 640 F. Supp. 767, 780 (D. Ariz. 1986). At the time of that earlier murder, "the death [penalty] had not yet become effective [in Arizona] so that the sentence of life imprisonment was the only possible sentence." *Id.* Richmond was acquitted of the other murder. *See id.*

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B

After a separate hearing held before the trial judge alone, the court pronounced its sentence:

> The court rendered a special verdict finding the existence of two aggravating circumstances: 1) that the defendant was previously convicted of a felony involving the use or a threat of violence on other persons, and 2) that the defendant had committed the offense in an especially heinous and cruel manner. It found none of the statutory mitigating circumstances to be present. Based on its findings, the court sentenced the defendant to death.

State v. Richmond, 114 Ariz. 186, 189, 560 P.2d 41, 44, *cert. denied*, 433 U.S. 915 (1976).

Richmond petitioned in state court for post-conviction relief claiming the discovery of new exculpatory evidence. He presented an affidavit from Daniel McKinney, a former boyfriend of Corella, in which McKinney stated that Corella had admitted to being the driver when the car ran over Crummett. The state countered with a transcribed tape recording in which McKinney claimed that Richmond had threatened him in prison. The petition for relief was denied. On automatic appeal, the Arizona Supreme Court affirmed both the conviction and the sentence, holding inter alia that (1) Richmond's case was properly submitted on a theory of felony murder, (2) post-conviction relief was properly denied, and (3) the Arizona death penalty statute was constitutional, both as written and as applied. *See* 114 Ariz. at 190-98, 560 P.2d at 45-53.

After the United States Supreme Court denied certiorari on direct appeal, Richmond petitioned for a writ of habeas corpus in the federal district court of Arizona. He argued that the Arizona statute unconstitutionally deprived him of the opportunity to present non-statutory mitigating circumstances before

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the judge at sentencing. The district court upheld Richmond's conviction but ruled the Arizona statute unconstitutional under the eighth and fourteenth amendments for its failure to allow consideration of a convict's character. *Richmond v. Cardwell*, 450 F. Supp. 519 (D. Ariz. 1978). The court therefore vacated Richmond's sentence.[2]

At a second sentencing hearing in March 1980, the state trial court again found no mitigating circumstances sufficient to warrant leniency, and it resentenced Richmond to death. Once again, on mandatory appeal, the Arizona Supreme Court affirmed the sentence. *State v. Richmond*, 136 Ariz. 312, 666 P.2d 57, *cert. denied*, 464 U.S. 986 (1983). Independently reviewing the record,[3] the state supreme court found that Richmond had actively participated in the robbery and had played an integral role in the events leading up to Crummett's death. Although it acknowledged that the force of Richmond's manual blows had not caused the death, the court held that circumstantial evidence supported Erwin's testimony that Richmond had been the lethal driver. It found that the sentence was appropriate under these conditions. Again on direct review, the United States Supreme Court denied certiorari. 464 U.S. 986 (1983).

Richmond then pursued a second writ of habeas corpus in federal court. After a brief hearing, the district court denied the writ and dismissed the petition. Four days later, a panel of this court stayed Richmond's execution and issued a certificate of probable cause to provide time for a full-fledged appeal. In due course, the court affirmed dismissal for failure to exhaust state remedies, but it remanded with instructions to allow amendment to permit the prosecution of any claims that

[2]The Arizona death penalty statute was subsequently revised to cure this defect. *See* Ariz. Rev. Stat. Ann. § 13-703(G), *as amended by* 1979 Ariz. Sess. Laws ch. 144, § 1 (effective May 1, 1979).

[3]*See infra* note 10.

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had been properly exhausted.[4] *Richmond v. Ricketts*, 730 F.2d 1318 (9th Cir. 1984). Following such amendment the district court again denied Richmond's petition, and this court again reversed, remanding for a full review of the state record. *Richmond v. Ricketts*, 774 F.2d 957 (9th Cir. 1985). After reviewing the full record, the district court denied Richmond's petition for the third time in a thirty-five page opinion. *Richmond v. Ricketts*, 640 F. Supp. 767 (D. Ariz. 1986).

Richmond now appears before this court with the assistance of counsel to appeal this most recent denial order. This court originally entertained oral argument in his appeal on September 18, 1987, but deferred submission pending the en banc decision of this circuit in *Adamson v. Ricketts*. *See* No. 84-2069 (9th Cir. Aug. 14, 1987) (en banc) (order scheduling oral argument for Oct. 20, 1987, in light of *Ricketts v. Adamson*, 483 U.S. 1 (1987)). *Adamson* presented a similar challenge to the constitutionality of Arizona's revised death penalty statute. A year later, in December 1988, the *Adamson* court ruled the Arizona statute unconstitutional. 865 F.2d 1011 (9th Cir. 1988) (en banc). Arizona petitioned the Supreme Court of the United States for review of that decision, and this court further deferred submission pending that outcome.

In the meantime, on direct review from the state's highest court, the Supreme Court of the United States announced in *Walton v. Arizona* that the Arizona death penalty statute is *not* unconstitutional. 110 S. Ct. 3047 (June 27, 1990), *reh'g denied*, 111 S. Ct. 14 (Aug. 30, 1990). In a companion case

[4]Under the "total exhaustion rule" announced by the Supreme Court in *Rose v. Lundy*, 455 U.S. 509 (1982), a federal court cannot adjudicate a habeas petition if it contains any unexhausted claims — even if it also contains exhausted claims. The remand order was intended to satisfy this rule. *See* 730 F.2d at 1318.

Upon amending his petition, Richmond continued to assert eighteen claims. *See* 774 F.2d at 959.

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decided that same day, *Lewis v. Jeffers*, the Court restated and elaborated upon its *Walton* holding. 110 S. Ct. 3092, *reh'g denied*, 111 S. Ct. 14 (1990). On the following day, the Court denied certiorari in *Adamson. Lewis v. Adamson*, 110 S. Ct. 3287 (1990), *denying cert. to Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) (en banc).

In light of these developments, this court ordered the parties to file supplemental briefs, and on September 27, 1990, the court entertained a second oral argument to consider the effects of *Walton*, *Jeffers*, and other recent Supreme Court decisions on this appeal. The court thereafter took the entire appeal under submission for decision.

II

A

The district court had proper jurisdiction under 28 U.S.C. § 2241. This court has proper jurisdiction under 28 U.S.C. § 2253. We review the denial of a habeas corpus petition de novo. *See Weygandt v. Ducharme*, 774 F.2d 1491, 1492 (9th Cir. 1985). However, under 28 U.S.C. § 2254(d), the factual findings of state trial and appellate courts are presumed correct if fairly supported by the record. *See Sumner v. Mata*, 449 U.S. 539, 546-47 (1981).

B

Richmond has presented four arguments: (1) that Arizona's death penalty law is unconstitutional both on its face and as applied, (2) that the trial court never specifically found that he caused, intended to cause, or attempted to cause Crummett's death and that imposition of the death penalty would therefore violate the rule of *Enmund v. Florida*, 458 U.S. 782 (1982), (3) that he was improperly denied an evidentiary hearing on his claim that Arizona's administration of the death penalty is unconstitutionally discriminatory, and (4) that fulfillment of

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his sentence after so many years on death row would constitute cruel and unusual punishment. Respondent Arizona has challenged all four contentions and has further argued that Richmond's petition constitutes an abuse of the writ. We address the state's latter contention first and then address Richmond's arguments sequentially.

III

In its 1978 judgment on Richmond's first petition for habeas relief, the district court vacated Richmond's sentence but affirmed his conviction. The State of Arizona argues that because Richmond failed to appeal the affirmance of his conviction at that time, it is abuse of the writ to challenge the conviction now. *See* 28 U.S.C. § 2244(b); Rules Governing Section 2254 Cases, Rule 9(b). A prior panel of this court has already addressed this contention. *See Richmond*, 774 F.2d at 959-61. We are bound to adopt its conclusions as the law of the case. *See Handi Inv. Co. v. Mobil Oil Corp.*, 653 F.2d 391, 392 (9th Cir. 1981); *see also* 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.404[1], at 119 (2d ed. 1988) ("If there is an appeal from the judgment entered after remand, the decision on the first appeal establishes the law of the case to be followed on the second.").

[1] Thus, to the extent that Richmond seeks to challenge his conviction on grounds that were available to him when he filed his first petition, we agree that he is barred from doing so now:

> The relief obtained on the first petition went only to the sentence. The incentive remained, therefore, for Richmond to appeal the rejection of his challenges to the *underlying conviction*, since if he were to prevail on appeal on these claims, he could not be resentenced. The district court could properly decline to reconsider these underlying-conviction claims when raised in a second petition.

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Richmond, 774 F.2d at 960 (emphasis in original). Whether termed abuse of the writ or res judicata, the reassertion of such claims is not permissible at this stage.

[2] Richmond, however, has focused his attention in the current appeal on challenging the re-imposition of his sentence. This he certainly may do, and in so doing, he may challenge the death penalty on grounds that were available to him but that he did not raise when contesting his first sentence:

> Previously unadjudicated claims must be decided on the merits unless the petitioner has made a conscious decision deliberately to withhold them, is pursuing "needless piecemeal litigation," or has raised the claims only to "vex, harass, or delay." None of these three situations applies to Richmond's petition.

Id. at 961 (citing *Sanders v. United States*, 373 U.S. 1, 18 (1963)). Richmond may also renew challenges to the death penalty that were raised in his first petition and *decided against him* by the district court:

> [W]hen the district court enjoined Richmond's [initial] death sentence, it relied solely on the [original] Arizona statute's failure to consider mitigating factors of an individual's character. *Richmond v. Cardwell*, 450 F. Supp. at 526. Because Richmond had obtained the sentencing relief he sought, he had no incentive to appeal the adverse determination of his other grounds for challenging the death sentence, and perhaps would not have been permitted to do so on mootness or ripeness grounds. The ends of justice would not be served by denying Richmond appellate consideration of these other constitutional challenges to the death penalty merely because he obtained relief on a different ground.

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Id. at 960. With respect to any of the proffered challenges to his sentence, therefore, "Richmond's petition does not constitute an abuse of the writ." *Id.* at 961.

IV

A

At the time of Richmond's conviction in 1974, Arizona law defined first-degree murder in relevant part as follows: "A murder which is perpetrated by . . . any . . . kind of wilful, deliberate and premeditated killing, or which is committed . . . in the perpetration of, or attempt to perpetrate . . . robbery . . . is murder of the first degree." Ariz. Rev. Stat. Ann. § 13-452 (repealed 1978) (current version at § 13-1105). For those convicted of first-degree murder, the Arizona code provides a sentencing hearing independent of the trial. § 13-703(B). Here, the trial judge must choose without the assistance of a jury between the options of life imprisonment and capital punishment. § 13-703(A)-(B). For purposes of this determination, a special verdict is required regarding the existence or non-existence of any aggravating or mitigating factors. § 13-703(D). The statute puts the burden of establishing the existence of any aggravating factors on the prosecution and the burden of establishing the existence of any mitigating factors on the defense. § 13-703(C). The statute then channels the court's discretion:

> [T]he court . . . shall impose a sentence of death if the court finds *one or more* of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

§ 13-703(E) (emphasis added).

Subsection F enumerates ten aggravating circumstances, including the following three:

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(1) The defendant was previously convicted of a felony in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

(2) The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

* * * *

(6) The defendant committed the offense in an especially heinous, cruel or depraved manner.

§ 13-703(F). By the time of Richmond's resentencing in 1980, subsection G of the statute had been revised to read as follows:

> Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any circumstances of the offense, including but not limited to [(1) the defendant's incapacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law, (2) the defendant's suffering of unusual or substantial duress, (3) the defendant's relatively minor participation in the crime, (4) the defendant's reasonable inability to foresee that his conduct would cause or would create the grave risk of causing death, and (5) the defendant's age].

§ 13-703(G).

B

Richmond challenges the constitutionality of this revised sentencing scheme on four grounds. First, he contends that

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judicial determination of the existence or nonexistence of aggravating circumstances impermissibly usurps the jury's fact-finding function. Second, he claims that requiring the defense to establish the existence of any mitigating circumstances illegitimately shifts the burden of proof. Third, he argues that the Arizona statute creates an unconstitutional presumption that death is the proper sentence. Finally, he insists that imposing the death penalty upon finding that the killing was "especially heinous, cruel or depraved" is unconstitutionally vague.

[3] The Supreme Court's recent decision in *Walton v. Arizona* specifically addressed and rejected the first three contentions, and Richmond has not forcefully advanced these arguments since.[5] With respect to the judicial determination of sentencing factors, the Court stated: " 'Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court.' " *Walton*, 110 S. Ct. at 3054 (quoting *Clemons v. Mississippi*, 110 S. Ct. 1441, 1446 (1990)). Indeed, even before *Walton*, it was well settled that " 'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.' " *Id.* (quoting *Hildwin v. Florida*, 490 U.S. 638, _, 109 S. Ct. 2055, 2057 (1989)); *see generally id.* at 3054-55 (Part II of the opinion). As the district court noted when it rejected this argument in Richmond's first petition:

[5]We have already had occasion to note *Walton*'s rejection of the first and third contentions. *See Smith v. McCormick*, 914 F.2d 1153, 1169-70 (9th Cir. 1990). We also note in passing that Richmond's able and experienced counsel, Timothy K. Ford, is intimately familiar with the *Walton* case. Mr. Ford represented Jeffrey Alan Walton in his petition before the United States Supreme Court. This fact — in addition to the cases' underlying similarity — may help to explain why several of the arguments raised here are identical to arguments decided by the Court in that case. *See infra* note 7 (noting the factual similarities between the two cases).

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> "[The Supreme Court] has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."

Richmond, 450 F. Supp. at 523 (quoting *Proffitt v. Florida*, 428 U.S. 242, 252 (1976)).*

[4] The *Walton* Court likewise rejected the contention that requiring the defendant to establish the existence of mitigating factors impermissibly shifts the burden of proof. Denying that the practice violates the eighth and fourteenth amendments, the Court ruled:

> So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency.

*Since the *Walton* decision, Richmond has apparently conceded that the sixth amendment does not require jury factfinding at the sentencing phase in capital punishment cases, but he has stressed the alternative argument that the equal protection clause *does* require jury factfinding at sentencing. Because Arizona law provides for jury factfinding in many similar circumstances, Richmond contends, it is arbitrary and irrational not to provide for it here. We find this argument unpersuasive. As the Supreme Court noted in *Proffitt*, there is indeed a rational reason for committing the factfinding function to the judge at the sentencing phase in capital punishment cases, and it probably promotes more evenhanded justice to do so. *See Proffitt*, 428 U.S. at 252. Moreover, the Court's sixth amendment holding on this issue in *Walton* would make little sense if the broader, less specific terms of the equal protection clause could be read to require the opposite result.

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Walton, 110 S. Ct. at 3055; *see generally id.* at 3055-56 (Part III of the opinion).

[5] Finally, the *Walton* Court also rejected the claim that the Arizona statute creates an impermissible presumption that death is the proper sentence for first-degree murder. Like Richmond, Walton had challenged the statute's directive that a court "*shall* impose a sentence of death" if it finds one or more aggravating circumstances and no substantial mitigating circumstances. Ariz. Rev. Stat. Ann. § 13-703(E) (emphasis added). Walton had contended, as Richmond does here, that this provision violates the proscription against mandatory death sentences announced in *Woodson v. North Carolina*, 428 U.S. 280 (1976). The Court disagreed, citing its recent decisions in *Blystone v. Pennsylvania*, 110 S. Ct. 1078 (1990), and *Boyde v. California*, 110 S. Ct. 1190, *reh'g denied*, 110 S. Ct. 1961 (1990), both of which had upheld similarly worded capital punishment laws. The Court ruled that so long as the statute provides individualized sentencing and does not automatically impose death for certain categories of murder, it passes constitutional muster under *Woodson*. *See generally Walton*, 110 S. Ct. at 3056 (Part IV of the opinion).

In short, the Supreme Court has specifically rejected three of the constitutional arguments raised here, and it has done so in the context of reviewing the very same statute.

C

Richmond insists, however, that his fourth constitutional challenge to the statute survives *Walton*. Indeed, he contends that *Walton* itself renders his death sentence unconstitutional and that this court's en banc decision in *Adamson v. Ricketts* mandates resentencing. *See Adamson*, 865 F.2d 1011 (9th Cir. 1988) (en banc), *cert. denied sub nom. Lewis v. Adamson*, 110 S. Ct. 3287 (1990). We are not persuaded.

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In *Walton*, another Arizona inmate who was convicted of first-degree murder and sentenced to death challenged his sentence on constitutional grounds.[7] The Supreme Court denied all four of his claims and affirmed the sentence. Despite this result, Richmond contends that Walton's fourth claim and the Court's disposition of that claim bolster his petition.[8]

[7]The facts of the *Walton* case are strikingly similar in many respects to the facts of the present case. Walton, who also acted with the assistance of two friends, "went to a bar in Tucson, Arizona, . . . intending to find and rob someone at random, steal his car, tie him up, and leave him in the desert . . . . In the bar's parking lot, the trio encountered Thomas Powell, a young, off-duty Marine." 110 S. Ct. at 3052. Forcing Powell to accompany them, the three commandeered his car and drove to a remote area on the outskirts of town. When they stopped, they

> forced Powell out of the car and had him lie face down on the ground near the car while they debated what to do with him. . . . Walton then took a .22 caliber derringer and marched Powell off into the desert. After walking a short distance, Walton forced Powell to lie down on the ground, placed his foot on Powell's neck, and shot Powell once in the head. Walton later told [his two accompanying friends] that he had shot Powell and that he had "never seen a man pee in his pants before."

Id. Despite the similarities, the circumstances of Powell's death were somewhat more gruesome than those of Crummett's:

> Powell's body was found approximately a week later . . . . A medical examiner determined that Powell had been blinded and rendered unconscious by the shot but was not immediately killed. Instead, Powell regained consciousness, apparently floundered about in the desert, and ultimately died from dehydration, starvation, and pneumonia approximately a day before his body was found.

Id.

[8]Walton's first three claims, which were also raised by Richmond, were the three claims discussed in Part IV-B above. First, Walton alleged that "every finding of fact underlying the sentencing decision must be made by a jury, not by a judge." 110 S. Ct. at 3054; *compare* Ariz. Rev. Stat. Ann. § 13-703(B). Second, he alleged that the Arizona statute unconstitutionally "imposes on defendants the burden of establishing, by a preponderance of the evidence, the existence of mitigating circumstances." 110 S. Ct. at

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In his fourth claim, Walton alleged that the aggravating circumstance found and relied upon by the sentencing judge — his commission of the crime "in an especially heinous, cruel or depraved manner" — was unconstitutionally vague. Ariz. Rev. Stat. Ann. § 13-703(F)(6); *see* 110 S. Ct. at 3056-57. The Supreme Court agreed that the relevant statutory provision was vague but did not agree that it was unconstitutional. In essence, the Court held that facial vagueness alone does not decide the question: one must look beyond the language of the suspect provision and consider the full circumstances attending its application. Safeguards built into the sentencing scheme through other provisions — and even extra-statutory procedural safeguards — may preserve the scheme's constitutional integrity. *See generally Walton*, 110 S. Ct. at 3056-58 (Part V of the opinion).

The Court found three such safeguards within Arizona law. First, the Arizona scheme provides for sentencing by a judge, not by a jury. That fact alone distinguished *Walton* from *Maynard v. Cartwright*, 486 U.S. 356 (1988), and *Godfrey v. Georgia*, 446 U.S. 420 (1980), two cases relied upon by Walton in which the Supreme Court had invalidated death sentences due to similarly vague statutory definitions of aggravating circumstances. Where a judge makes the sentencing findings there is less danger of impermissibly broad applications of statutory terms: "Trial judges are presumed to know the law and to apply it [correctly] in making their decisions." *Walton*, 110 S. Ct. 3057.

Second, the Court found, the Arizona Supreme Court had effectively salvaged the suspect provision by affording it a

3055; *compare* Ariz. Rev. Stat. Ann. § 13-703(C). Third, he alleged that the Arizona statute "creates an unconstitutional presumption that death is the proper sentence" because it *requires* the death penalty "if one or more aggravating circumstances are found and mitigating circumstances are held insufficient to call for leniency." 110 S. Ct. at 3056; *compare* Ariz. Rev. Stat. Ann. § 13-703(E). The Supreme Court rejected all three of these claims as well as the fourth, which is discussed herein.

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"limiting definition" in the course of reviewing the trial judge's sentencing decision. What the state legislature had improvidently left out, the state supreme court properly inserted:

> The Arizona Supreme Court stated that "a crime is committed in an especially cruel manner when the perpetrator inflicts mental anguish or physical abuse before the victim's death," and that "[m]ental anguish includes a victim's uncertainty as to his ultimate fate." . . .
>
> * * * *
>
> Recognizing that the proper degree of definition of an aggravating factor is not susceptible of mathematical precision, we conclude that the definition given to the "especially cruel" provision *by the Arizona Supreme Court* is constitutionally sufficient because it gives meaningful guidance to the sentencer.

Id. at 3057-58 (quoting *State v. Walton*, 159 Ariz. 571, 586, 769 P.2d 1017, 1032 (1989)) (emphasis added). By injecting this limiting definition into a sentencing process already restricted to judges, Arizona provided ample protection for Walton's constitutional rights.

> If the Arizona Supreme Court has narrowed the definition of the "especially heinous, cruel or depraved" aggravating circumstance, we presume that Arizona trial judges are applying the narrower definition. It is *irrelevant* that the statute itself may not narrow the construction of the factor.

Id. at 3057 (emphasis added).

Third, the Court reasoned:

> [E]ven if a trial judge fails to apply the narrowing construction or applies an improper construction, the Constitution does not necessarily require that a state appellate court vacate a death sentence based on that factor. Rather, as we held in *Clemons v. Mississippi*, 494 U.S. _, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), a state appellate court may itself determine whether the evidence supports the existence of the aggravating circumstance as properly defined or the court may eliminate consideration of the factor altogether and determine whether any remaining aggravating circumstances are sufficient to warrant the death penalty.

Id.

In his reliance on *Walton*, Richmond points out as an initial matter that the same aggravating circumstance at issue in that case was cited by the Arizona Supreme Court in its review of his death sentence. Richmond insists that the terms of this aggravating circumstance — "especially heinous, cruel or depraved" — are facially vague. He is undeniably correct; *Walton* held so explicitly. Richmond then argues, however, that whereas the Arizona Supreme Court cured this potential defect in *Walton*, it failed to do so in his case. The court, he maintains, applied no comparable "limiting construction" in its review of his sentence. This contention is empirically incorrect.

[6] In reviewing Richmond's sentence, the Arizona Supreme Court quite clearly *did* provide a limiting construction for the admittedly vague aggravating circumstance. In fact, if anything, the state court provided a more narrowly tailored and more obviously sufficient limiting construction in Richmond's case than it did in Walton's:

> "Cruel" has been defined as "disposed to inflict pain especially in a wanton, insensate or vindictive man-

ner: sadistic." *State v. Knapp*, 114 Ariz. 531, 543, 562 P.2d 704 (1977), *cert. denied*, 435 U.S. 908, 98 S. Ct. 1458, 55 L. Ed. 2d 500 (1978). Cruelty involves the victim's pain or suffering before death. *State v. Gretzler*, [135 Ariz 42, 659 P.2d 1 (1983)]; *State v. Poland*, 132 Ariz. 269, 645 P.2d 784 (1982); *State v. Lujan*, 124 Ariz. 365, 604 P.2d 629 (1979). The offense must be committed in an *especially* cruel, heinous or depraved manner to be considered an aggravating circumstance. *State v. Lujan*, *supra*. . . .

"Heinous" has been defined as "hatefully or shockingly evil; grossly bad," and "depraved" is "marked by debasement, corruption, perversion or deterioration." *State v. Knapp*, *supra*. Heinous and depraved involve the mental state and attitude of the offender as reflected in his words and actions. *State v. Gretzler*, *supra*; *State v. Poland*, *supra*; *State v. Lujan*, *supra*. In *Gretzler*, *supra*, we discussed factors which lead to a finding of heinousness or depravity. One factor is the infliction of gratuitous violence on the victim; another related factor is the needless mutilation of the victim. Here the victim was already unconscious and bleeding when he was run over not once, but twice, each time from a different direction. The evidence indicates that the first run by the vehicle was over the victim's head crushing his skull and killing him. The second run of the vehicle was over the body of the victim. The investigating officers found, at the location of the murder, two large pools of blood separated by about 30 feet, which was consistent with the body having been run over and dragged to where it was found. . . .

. . . We believe the facts of this case set it "apart from the normal first degree murders." *State v. Brookover*, 124 Ariz. 38, 601 P.2d 1322 (1979).

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Richmond, 136 Ariz. 312, 319, 666 P.2d 57, 64 (plurality opinion) (finding Crummett's killing especially heinous and depraved but not especially cruel);[9] *compare id. with Walton*, 159 Ariz. at 586-88, 769 P.2d at 1032-34.

[7] As in *Walton*, the sentence in this case was (a) imposed by a trial judge presumably knowledgeable in the law, (b) thoroughly and independently reviewed by the Arizona Supreme Court, and (c) reimposed under a sufficiently limiting construction.[10] Under a fair reading of *Walton* and the record alone, therefore, Richmond's contentions must fail.

[8] Richmond attempts to avoid this conclusion by challenging the legal accuracy of the Arizona Supreme Court's limiting construction. He cites several state court decisions, most notably *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1

[9]Richmond argues that only two of the five Justices of the Arizona Supreme Court concurred in this portion of the court's opinion. He is correct. Two other Justices voted to affirm the sentence but on other grounds. They explicitly rejected the argument that the killing had been especially heinous and depraved. *See Richmond*, 136 Ariz. 322-24, 666 P.2d at 67-69 (Cameron, J., concurring and Gordon, V.C.J., joining). The fifth Justice dissented altogether. *See* 136 Ariz. 324-26, 666 P.2d at 69-71 (Feldman, J., dissenting). The fact that a majority of the court did not concur in this finding, however, does not deny that the Justices who did concur in it provided an adequate limiting construction. The relevant point is that members of the court who premised their votes on the challenged factor undertook the deliberations and analysis constitutionally required.

More importantly, Richmond's observation is irrelevant in light of the fact that *four* Justices concurred in the finding of two other aggravating circumstances, either one of which could constitutionally have justified imposition of the death penalty. *See infra* Part IV-D.

[10]*See Richmond*, 136 Ariz. at 317, 666 P.2d at 62 ("[I]n each case where the death penalty is imposed, this court conducts an independent review of the record to assure a just result. We have reviewed the record in the instant case . . ."); 136 Ariz. at 320, 666 P.2d at 65 ("In death penalty cases, this court will conduct an independent examination of the record to determine for ourselves the presence or absence of aggravating and mitigating circumstances and the weight to give to each. We also independently determine the propriety of the sentence.").

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(1983), for the proposition that the court applied a definition of the aggravating circumstance that is untenable under Arizona law. This court, however, is foreclosed from engaging in any such inquiry. A federal appellate court cannot challenge the Arizona Supreme Court on matters of Arizona law; in that realm, the authority of the state court remains supreme.

Both *Walton* and its companion case, *Lewis v. Jeffers*, 110 S. Ct. 3092 (1990), support this analysis. As *Walton* pointed out, the relevant focus for this court's attention is not upon the language of the Arizona statute per se or even upon the sentencing decision of the state trial judge; rather, it is upon the constitutional legitimacy of Richmond's sentence as that sentence stands *today* after review by and exhaustion of the state court process. *See Walton*, 110 S. Ct. at 3057-58. The only question for this court is whether the *final* state result violates constitutional law so as to warrant granting a writ of habeas corpus. *Walton* requires this court to pay due deference to state judicial systems in the administration of their own criminal sanctions and to recognize both the competence and duty of state courts of general jurisdiction to enforce federal constitutional law.

Jeffers thoroughly reinforces the *Walton* rule. In *Jeffers*, the Supreme Court restated and reapplied the *Walton* holding to deny another Arizona prisoner's challenge to the legitimacy of his death sentence. Because *Jeffers* was before the Court on collateral review, the Court concluded that even greater deference was owed to the state system than the Court had urged in *Walton*, which it had heard on direct review. The Court never reached the merits of Jeffers's constitutional claims, and it certainly never approached any questions of state law; rather, the Court reached its decision upon formulation of the appropriate standard of review. Writing for the Court, Justice O'Connor explained:

> [R]espect for a state court's findings of fact and application of its own law counsels against the sort

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> of *de novo* review undertaken by the Court of Appeals in this case. . . . Where the issue is solely whether a state court has properly found existence of a constitutionally narrowed aggravating circumstance, we have never required federal courts "to peer majestically over the [state] court's shoulder so that [they] might second-guess its interpretation of facts that quite reasonably — perhaps even quite plainly — fit within the statutory language." . . .
>
> Rather, in determining whether a state court's application of its constitutionally adequate aggravating circumstance was so erroneous as to raise an independent due process or Eighth Amendment violation, we think the more appropriate standard of review is the "rational factfinder" standard established in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). We held in *Jackson* that where a federal habeas corpus claimant alleges that his state conviction is unsupported by the evidence, federal courts must determine . . . "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Jeffers, 110 S. Ct. at 3102-03 (quoting *Godfrey v. Georgia*, 446 U.S. 420, 450 (1980) (White, J., dissenting) and *Jackson v. Virginia*, 443 U.S. 307, 319, *reh'g denied*, 444 U.S. 890 (1979)) (emphasis in original).

In short, this court's focus must not be on the underlying sentence but on whether the *state system* in both imposing and reviewing that sentence committed an *independent* constitutional violation. To vacate Richmond's sentence, this court would have to find that there is no rational basis in law or fact for the state supreme court's final evaluation that the circumstances warrant the sentence of death:

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> [A] federal court should adhere to the *Jackson* standard even when reviewing the decision of a state appellate court that has independently reviewed the evidence, for the underlying question remains the same: if a State's aggravating circumstances adequately perform their constitutional function, then the state court's application of those circumstances raises, apart from due process and eighth amendment concerns, only a question of the proper application of state law. A state court's finding of an aggravating circumstance in a particular case — *including a de novo finding by an appellate court that a particular offense "is especially heinous . . . or depraved"* — is arbitrary or capricious if and only if no reasonable sentencer could have so concluded.

Id. at 3103 (emphasis added).

We therefore reject Richmond's invitation to "conduct[ ] a *de novo*, case-by-case comparison of the facts" of various state court precedents. *Id.* at 3101. Like the Supreme Court in *Walton*, we "conclude that the definition given to the 'especially cruel' provision by the Arizona Supreme Court is constitutionally sufficient." *Walton*, 110 S. Ct. at 3058. Applying *Jeffers*, we further conclude that under that definition a rational factfinder could indeed have found Crummett's murder heinous or depraved so as to warrant the penalty of death.

D

[9] Even if Richmond were to prevail in his claim that the Arizona Supreme Court failed to provide a sufficiently limiting construction for the aggravating circumstance discussed above, however, his contentions would still lack merit. The Arizona Supreme Court rested its affirmance of his sentence upon a finding of not one, but three aggravating circumstances and an insufficient showing of mitigating circumstances. *See Richmond*, 136 Ariz. at 318-21, 666 P.2d at 63-

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66. The second aggravating factor relied upon was Richmond's conviction for another murder six months after his initial conviction. Although this latter conviction postdated Richmond's first, "[i]t is not disputed that the killing that was the basis of th[at] conviction occurred prior to the murder of Bernard Crummett." *Richmond*, 640 F. Supp. at 780; *see supra* note 1. In any event, both convictions were duly on record by the time of Richmond's resentencing in 1980.

Furthermore, although the state supreme court explicitly found and addressed only these two aggravating circumstances, it held that "[t]he trial court correctly found three aggravating circumstances." *Richmond*, 136 Ariz. at 320, 666 P.2d at 65. The third was an entirely separate prior conviction for kidnapping — statutorily relevant for death penalty purposes as an offense "involving the use or threat of violence on another person." Ariz. Rev. Stat. Ann. § 13-703(F)(2)." Arizona law explicitly provides that a single aggravating circumstance may suffice for imposition of the death penalty. *See* § 13-703(E).

Richmond does not contend, nor could he reasonably, that the statutory definitions of these two other factors are uncon-

"The court also hinted at the possible applicability of a fourth aggravating circumstance: the defendant's commission of the crime in expectation of pecuniary gain. *See* Ariz. Rev. Stat. Ann. § 13-703(F)(5); *Richmond*, 136 Ariz. at 320, 666 P.2d at 65. Although noting that the trial court had improperly analyzed this factor in reaching the conclusion that it did not apply, the Arizona Supreme Court declined to determine whether under a proper analysis it would apply.

With respect to consideration of Richmond's kidnapping conviction, the Arizona Supreme Court's majority opinion does not address it except to express general agreement with the trial court's reliance upon it. The concurrence, which was endorsed by two Justices, is somewhat more explicit in its embrace of the lower court's reliance on both the prior murder conviction *and* the prior kidnapping conviction. *See Richmond*, 136 Ariz. at 323-24, 666 P.2d at 68-69 (Cameron, J., concurring and Gordon, V.C.J., joining).

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stitutionally vague. *See* § 13-703(F)(1)-(2). Rather, he sidesteps consideration of these additional factors by citing this circuit's en banc decision in *Adamson v. Ricketts* for the proposition that invalidation of any one aggravating circumstance requires resentencing. *See* 865 F.2d at 1037 n.42, 1038, 1039. We have just held that the aggravating circumstance to which Richmond refers is *not* invalid, but assuming for the sake of argument that it is, Richmond's reliance on *Adamson* is not well taken.

The Supreme Court granted certiorari in *Walton* specifically *because of* this circuit's en banc holding in *Adamson*,[12] and *Walton* reached the opposite conclusion regarding the Arizona statute's constitutionality. Even if the portion of *Adamson* upon which Richmond relies survives *Walton*, it still does not support his claim. Contrary to the suggestion, *Adamson* did not hold that invalidation of one aggravating circumstance automatically requires remand for resentencing; rather, the court simply noted that it is the common practice of the Arizona Supreme Court to remand for resentencing when *that court* invalidates an aggravating circumstance. *Id.* There is no suggestion in *Adamson* that the United States Constitution requires remand when one aggravating factor is eliminated from the analysis if sufficient other aggravating factors remain.

The Supreme Court's recent decision in *Clemons v. Mississippi*, 110 S. Ct. 1441 (1990), upon which Richmond also relies, is not to the contrary. In *Clemons*, a Mississippi inmate challenged the constitutionality of a death sentence imposed partially on the basis of a court's finding that it had been an

[12]*See Walton*, 110 S. Ct. at 3054 ("Because the United States Court of Appeals for the Ninth Circuit has held the Arizona death penalty statute to be unconstitutional for the reasons submitted by Walton in this case, *see Adamson v. Ricketts*, 865 F.2d 1011 (1988) (en banc), we granted certiorari."); *id.* at 3059 (Scalia, J., concurring) (describing *Adamson* and *Walton* as "essentially identical" cases).

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"especially heinous, atrocious or cruel" killing. *Id.* at 1445. The Mississippi law in question permitted imposition of the death penalty upon a finding of only one aggravating circumstance so long as that aggravating circumstance outweighed all mitigating circumstances. Finding the state supreme court's consideration of the "especially heinous" factor impermissibly vague, the Supreme Court remanded for resentencing.

[10] The Court did not hold, however, that imposition of the death penalty on the basis of the single remaining aggravating factor would have been ipso facto unconstitutional. Rather, it implicitly recognized that reliance on a single aggravating factor *can* be constitutional. *See id.* at 1446, 1450-51. The Court remanded because once the vague factor was removed from the analysis, it was unclear from the Mississippi Supreme Court's opinion whether the one remaining circumstance still outweighed all the mitigating evidence. *See id.* at 1449-51 (Parts III-IV of the opinion).

[11] In this case, there is no similar doubt. Elimination of the challenged factor would still leave enough support for Richmond's sentence because the statute at issue here is fundamentally different from the statute at issue in *Clemons*. The Mississippi law that *Clemons* considered authorizes the death penalty if " 'there are insufficient mitigating circumstances . . . to *outweigh* the aggravating circumstances.' " *Id.* at 1446 n.2 (quoting Miss. Code Ann. § 99-19-101(3)(c) (Supp. 1989)) (emphasis added). Arizona's law mandates the death penalty "if the court finds *one or more* of the [enumerated] aggravating circumstances . . . *and* that there are no mitigating circumstances *sufficiently substantial to call for leniency*." Ariz. Rev. Stat. Ann. § 13-703(E) (emphasis added). The difference is significant: a conclusion by the Arizona courts that there are no substantial mitigating circumstances is separate from and independent of any conclusion regarding the existence of aggravating circumstances. Invalidation of an aggravating circumstance does not mandate reweighing or require

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resentencing where the court has found that the prosecution has met its burden of establishing aggravation sufficient to warrant the state's harshest penalty *two or three times* and that the defense has failed to establish mitigating circumstances sufficiently substantial to call for leniency. *See id.* §§ 13-703(C), (E). Under the statute at issue in *Clemons*, the invalidation of an aggravating circumstance necessarily renders any evidence of mitigation "weightier" or more substantial in a relative sense; the same, however, cannot be said under the terms of the Arizona statute at issue here. Nothing in the Arizona statute suggests the need for plenary reweighing where the record still reveals that there are "one or more of the [enumerated] aggravating circumstances . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency." *Id.* § 13-703(E).

V

Richmond next contends that because the trial court never specifically found that he caused, intended to cause, or attempted to cause Crummett's death, imposition of the death penalty would violate the rule of *Enmund v. Florida*, 458 U.S. 782 (1982). The defendant in *Enmund* had been convicted of felony murder and sentenced to death for his involvement in the killing of two robbery victims, even though the record only suggested that he was the driver of the get-away car. In vacating Enmund's sentence, the Supreme Court held that imposition of the death penalty violates the eighth and fourteenth amendments in the absence of a specific finding by the trier of fact that the defendant actually killed, attempted to kill, intended to kill, or contemplated that life would be taken:

> Enmund himself did not kill or attempt to kill; and, as construed by the Florida Supreme Court, the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder. Yet under Florida law death was an authorized penalty because Enmund aided

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> and abetted a robbery in the course of which murder was committed.

Id. at 798; *see id.* at 801.

Enmund, however, is clearly distinguishable from the present case. The jury that convicted Richmond received instructions on both premeditated and felony murder, and the record before us clearly provides sufficient evidence for a finding that Richmond expressly intended to participate in and to facilitate that murder. Moreover, the Supreme Court's holding in *Enmund* was predicated upon the attenuated nature of the defendant's responsibility for the deaths in that case. As the Supreme Court pointed out more recently in *Tison v. Arizona*, 481 U.S. 137, *reh'g denied*, 482 U.S. 921 (1987), *Enmund* does not stand for the blanket proposition that capital punishment is unconstitutional in cases of felony murder:

> [S]ome nonintentional murderers may be among the most dangerous and inhumane of all — the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill." . . . [W]e hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.
>
> . . . .

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> . . . [W]e simply hold that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement.

481 U.S. at 157-58 (footnote omitted).

Furthermore, in its independent review of the record in this case, the Arizona Supreme Court explicitly did consider *Enmund*, and it set forth findings sufficient to satisfy both that test and the Supreme Court's later pronouncements in *Tison*:

> Even if we accept appellant's contention that he was not driving the car when the victim was run over, we do not believe this case falls within the parameters of *Enmund*. The facts from the appellant's version indicate that he was the leader of the group; he was the first to use violent force on the victim; he was aware that the victim, if allowed to live, could identify him. Appellant, from his version of the facts, was willing to leave the wounded and unconscious victim alone in the desert to an uncertain fate. . . . There is no evidence that appellant protested or showed any emotion when the victim was twice run over. The appellant's version of the facts indicates appellant played an integral part in the events which caused the victim's death, and he willingly assisted in the acts which were intended to cause the victim's death.
>
> The evidence presented by the state was that the appellant drove the vehicle over the victim, thus killing him. The testimony of Faith Erwin was that the appellant was the driver at the time the victim was run over. The circumstantial evidence supports Faith's testimony.

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Richmond, 136 Ariz. at 318, 666 P.2d at 63.[13]

[12] Nor does it matter that the *Enmund* finding was made by the state supreme court rather than by the original sentencing court:

> At what precise point in its criminal process a State chooses to make the *Enmund* determination is of little concern from the standpoint of the Constitution. . . .
>
> . . . [W]hen a federal habeas court reviews a claim that the death penalty has been imposed on one who has neither killed, attempted to kill, nor intended that a killing take place or lethal force be used, the court's inquiry cannot be limited to an examination of jury instructions. Rather, the court must examine the entire course of the state-court proceedings against the defendant in order to determine whether, at some point in the process, the requisite factual finding as to the defendant's culpability has been made.

Cabana v. Bullock, 474 U.S. 376, 386-87 (1986) (footnote omitted). Accordingly, we conclude that the Arizona courts have predicated Richmond's sentence upon a sufficient finding of criminal intent.

VI

[13] As a black male of moderate means, Richmond next contends that the district court erred in denying his request for

[13]Interestingly, the Arizona Supreme Court conducted its *Enmund* analysis in this case before the United States Supreme Court narrowed the *Enmund* holding in *Tison*. The United States Supreme Court decided *Enmund* in 1982; the Arizona Supreme Court affirmed Richmond's sentence in 1983; and the United States Supreme Court decided *Tison* in 1987.

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an evidentiary hearing upon his claim that Arizona's administration of the death penalty is racially, sexually, and socio-economically discriminatory. We disagree. A habeas corpus petitioner is entitled to an evidentiary hearing both if he "alleges facts which, if proved, would entitle him to relief" and if he did not receive a full and fair evidentiary hearing on the issue in the state court. *Townsend v. Sain*, 372 U.S. 293, 312 (1963); *see id.* at 312-19. The facts that Richmond has alleged, even if proven, would not entitle him to relief.

In support of his request for a hearing on this issue in the district court, Richmond made an extensive proffer of what he seeks to prove:

> The proffer included that, although 15% of the victims of homicides in Arizona since 1973 have been black, every person under death sentence was convicted of killing a white victim; that [although] approximately 10% of the persons convicted of homicide in Arizona since 1973 have been women, no women are on death row. All three experts who had examined the Arizona death sentencing process from 1973 to the present [March 1987] found significant discrepancies based on the victim's race; two found evidence of discrimination based on the defendant's race, and one demonstrated significant disparities based on sex and economic status as well.

Brief for Appellant at 38-39 (citations omitted). This proffered evidence, however, is precisely the sort of generalized statistical evidence that was rejected as unactionable by the Supreme Court in *McKleskey v. Kemp*, 481 U.S. 279, *reh'g denied*, 482 U.S. 920 (1987). Even if proven, the statistical disparities to which Richmond points would be insufficient to support an inference of purposeful discrimination in his own case. To require the district court to weigh this evidence would be to suggest that Richmond's death sentence could conceivably be invalidated solely on the basis of his physical

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or social affinity to other defendants who are not now before this court but who may have suffered unconstitutional discrimination in their receipt of the same sentence. This we cannot do. To prevail in challenging his sentence under the equal protection clause, Richmond "must prove that the decision-makers in *his* case acted with discriminatory purpose." *McKleskey*, 481 U.S. at 292 (emphasis in original). Richmond has alleged no facts to suggest that either the Arizona Supreme Court, the state trial court, or the prosecutor's office acted with prejudicial or discriminatory purpose in either seeking or imposing his sentence. The district court thus properly denied his request for an evidentiary hearing on this issue. *See generally id.* at 292-320.

VII

[14] Richmond's final contention is that fulfillment of his sentence after sixteen years on death row would constitute cruel and unusual punishment in violation of the eighth and fourteenth amendments.[14] We know of no decision by either the United States Supreme Court or this circuit that has held that the accumulation of time a defendant spends on death row during the prosecution of his appeals can accrue into an independent constitutional violation, and Richmond has cited no such decision.

On the other hand, the State of Arizona has directed the court's attention to two relevant, though not controlling, precedents. In a decision affirmed two years later by the Tenth Circuit, the United States District Court for the District of

[14]Richmond actually alleged that fulfillment of his sentence after *thirteen* years on death row would constitute cruel and unusual punishment. Because he raised that claim in his opening brief, which was filed in 1987, we have added the past three years during which we deferred submission of his appeal. We note, however, that because this appeal properly concerns Richmond's sentence only as of the date of its reimposition in 1980, the relevant period of his residency on death row is actually ten years.

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Utah rejected a similar claim brought by a habeas corpus petitioner who had been on death row for ten years. *Andrews v. Shulsen*, 600 F. Supp. 408, 431 (D. Utah 1984), *aff'd*, 802 F.2d 1256 (10th Cir. 1986), *cert. denied*, 485 U.S. 919, *reh'g denied*, 485 U.S. 1015 (1988). The court reasoned that to accept the petitioner's argument would be "a mockery of justice" given that the delay was attributable more to the petitioner's actions than to the state's. *Id.* Like Richmond, the petitioner in *Andrews* had sought "extensive and repeated review of [his] death sentence." *Id.* Arizona also points to the well-known decision of the California Supreme Court in *People v. Chessman*, in which that court rejected the same claim by an eleven-year death-row inmate. 52 Cal. 2d 467, _, 341 P.2d 679, 699 (1959), *cert. denied*, 361 U.S. 925, *reh'g denied*, 361 U.S. 941 (1960). Finally, we note the decision of the United States Supreme Court in *Harrison v. United States*, 392 U.S. 219, 221 n.4 (1968), which the district court cited in its rejection of this claim and which held that an eight-year delay between an arrest and sentencing was not unconstitutional where the delay resulted from the need to assure careful review of an unusually complex case. *See Richmond*, 640 F. Supp. at 803 (citing *Harrison*).

Especially in light of the relative absence of contrary precedents, we believe that the reasoning of these cases is sound. A defendant must not be penalized for pursuing his constitutional rights, but he also should not be able to benefit from the ultimately unsuccessful pursuit of those rights. It would indeed be a mockery of justice if the delay incurred during the prosecution of claims that fail on the merits could itself accrue into a substantive claim to the very relief that had been sought and properly denied in the first place. If that were the law, death-row inmates would be able to avoid their sentences simply by delaying proceedings beyond some threshold amount of time, while other death-row inmates — less successful in their attempts to delay — would be forced to face their sentences. Such differential treatment would be far more "arbitrary and unfair" and "cruel and unusual" than the current system of fulfilling sentences when the last in the line of appeals fails on the merits. We thus decline to recognize Richmond's lengthy incarceration on death row during the pendency of his appeals as substantively and independently violative of the Constitution.

VIII

For the foregoing reasons, we affirm the judgment of the district court and deny Richmond's petition for a writ of habeas corpus.

AFFIRMED.

APPENDIX B

STATE OF ARIZONA)
) ss. AFFIDAVIT
County of Pima)

James M. Howard, being first duly sworn upon his oath, deposes and says:

That he is the deputy county attorney assigned to the case of State of Arizona v. Willie Lee Richmond, A-24252. That he prosecuted the case at trial. That during the course of the State's case at trial he talked with Rebecca Corrella in Tucson on several occasions. That she became angry with the state's representatives and professed her love for Mr. Richmond, threatened to take the stand for the defense and take the blame for the murder. That your affiant then personally informed Mr. Edward Bolding during the State's case in chief that Rebecca Corrella was at that time, "willing to take the rap," for Willie Richmond. That thereafter during the trial your affiant saw Mr. Bolding speaking with Rebecca Corrella and enter a small private office at the Courthouse with her. That despite her availability and apparent willingness to testify for the defense she was never called by the defense.

Your affiant further states upon information and belief that the State of California has the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings and that Rebecca Corrella would be available now for service of a subpoena under that Act.

Further affiant sayeth not.

JAMES M. HOWARD

Subscribed and sworn to before me this 7th day of November 1974.

NOTARY PUBLIC

My commission expires:

My Commission Expires Jan. 28, 1978

"Exhibit I"

Pima County Attorney
County Governmental Center
and Administration Bldg.
32 N. Stone Avenue
Tucson, Arizona 85701
792-8411
Cable

B-1

R

APPENDIX C

STATE OF ARIZONA)
) ss. AFFIDAVIT
County of Pima)

Morris Reyna, being first duly sworn upon his oath, deposes and says:

That the attached transcript marked "Exhibit IIA" is a true and accurate transcript of a tape recorded interview which your affiant had with Daniel McKinney at the Arizona State Prison on the 6th day of November, 1974.

That the attached transcript marked "Exhibit IIB" is a true and accurate transcript of the original formal statement by Rebecca Corella made to police concerning the death of Bernard Crummit.

That affiant talked personally with Rebecca Corella in Los Angeles, California on the 2nd day of November, 1974. That she adheres to her original statement and disclaims any contrary statements. That she was seen personally by this officer who knows her and that she is available for service of a subpoena.

Your affiant further states that he saw Rebecca Corella in Tucson on numerous occasions during the trial of Willie Lee Richmond in A-24252 and saw her on at least one occasion, during that trial in the Court House, in the company of Edward Bolding, Esq.

Further affiant sayeth not.

MORRIS REYNA

Subscribed and sworn to before me this 7 day of November, 1974.

NOTARY PUBLIC

My commission expires:
July 25, 1977

"Exhibit II"

Pima County Attorney
County Governmental Center
Administration Bldg.
111 W. Congress Street
Tucson, Arizona 85701
792-8411
CA-84

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The date today is 6 November, 1974. The time now is 1058 hours.

This is Detective Reyna and Detective Condis interviewing Danny McKinney at Arizona State Prison.

MR: May I have your full name please.

DM: Daniel Lee McKinney.

MR: And your age Danny.

DM: 20.

MR: And what's your ASP number?

DM: 33341.

MR: O.K. Danny, uh, we've had a brief conversation regarding a statement you made about a killing which Rebecca Corella and Willy Richmond, this is a murder in which Richmond is presently at Arizona State Prison. The man that was killed is Bernard Crummet (ph). Do you know the victim's name in this case before I told you about it?

DM: No, I don't.

MR: O.K. Now you gave a statement regarding the death of this man to the defense attorney in this case. Do you remember the name, that man's name?

DM: Uh, Willy Richmond?

MR: No, the attorney who you spoke to.

DM: Dardis.

MR: Where was that statement taken?

DM: Right here in the prison.

MR: O.K. Now in that statement, uh, do you remember what you told him?

DM: Uh, yes, I told him that I had uh, lived with this lady named Becky Corella at 909 West Wedwick(?) and uh, she and I was going together when she gave me a statement regarding the murder where she told me that Willy Richmond had went with her, I mean killed this dude, and she was scared you know because they were gonna kill her, and I told her not to worry about it you know, and uh, as I got arrested in the meantime, I was threatened and told by Willy Richmond that he had friends up to the joint and when I get there, they were going to kill me. The way it is right now I'm still scared because there's guys here right now that's trying to kill me, and there's six people in the street who seen me, there's three who already sent messages to where I'm at, that uh, I've had it, and uh, I don't know what to do. I'm about to lose my mind in this place you know. I'm scared man.

MR: Did you live with Rebecca Corella after the killing?

"Exhibit IIA"

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DM: Yes I did live with her.

MR: O.K. Did she tell you that she had committed the homicide?

DM: No she didn't.

MR: Did she tell you who had?

DM: Yes she did.

MR: Did she tell you how it came down?

DM: Yes she did.

MR: Would you tell me how it came down, what she told you?

DM: Willy Richmond uh, beat the dude up, and then ran over the dude and uh, she was scared and she didn't know what to do so she said she was going to go to the police which she did go to the police.

MR: Since you've been in Arizona State Prison has Willy Richmond talked to you?

DM: No he hasn't, but his lawyer has.

MR: His lawyer has. Has Richmond sent any messages to you?

DM: Yes, he has.

MR: And do you remember what those messages said?

DM: That I've had it if I don't make a statement, a phoney statement regarding the murder. I've had it.

MR: Why did he want you to make a phoney statement.

DM: Because uh, he wanted me to get up in the courtroom and tell a lie.

MR: O.K. so he can get <u>off?</u>

DM: So he can try to get off the hook for killing somebody that he killed.

MR: O.K. Did you get any messages from Willy Richmond while you were at the County Jail?

DM: Yes I did.

MR: What did those messages say?

DM: My life is going be over with when he get his hands on me. Him and Spencer Watson and quite a few other different guys.

MR: O.K. now, since you've been up here in prison, you've indicated that an attorney by the name of Dardis. Do you remember his first name?

DM: No I don't.

MR: O.K. Mr. Dardis came up and talked to you. Did he threaten you in any way?

DM: Well he told me either, either I'd uh, if I was caught talking to you guys that he was going to tell Willy and that'd be all over for me since, since I'm up here, excuse me.

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MR: O.K. How many times did you talk to Dardis?

DM: Once.

MR: Once.

DM: For about an hour.

MR: O.K. Did you give him a statement at that time?

DM: Yes I did.

MR: Would you again tell me what you told him in that statement.

DM: I told him that Becky had uh, ran over the man, and I told him that uh, that she was the one that committed the murder which I wasn't telling the truth because under depression, I mean, what can you do man, you know, what can you do. I mean, me telling the truth, the only reason I'm telling the truth man because you know, I just hope man that I come out right? you know.

MR: O.K. now talk just a little bit louder. We're using a tape recorder and it's in front of you right?

DM: Right.

MR: O.K. Now did uh, this attorney make any other threats beside the one you just told me about?

DM: Well the threats he made is all he had to say you know, I'm dead man.

MR: He said that right off the bat?

DM: Yeah.

MR: O.K. Yes or no?

DM: Yes.

MR: O.K. Now, in other words, what you're saying is that the statement that you gave to Mr. Dardis is a lie and the reason it's a lie is because that Willy made threats and Mr. Dardis made threats to you?

DM: Yes.

MR: And did you also sign a statement or an affidavit?

DM: Yes I did.

MR: Is that affidavit a lie?

DM: Yes it is.

MR: And why did you sign that?

DM: 'Cause I was scared man.

MR: And because you had been threatened?

DM: That's right. Wouldn't you sign it if you were up here amongst all these wild animals man, and you know, first thing you know you walk out on the yard and somebody walks around, it'll shake you man, you know. Paranoid man.

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MR: O.K. Now is this a true and voluntary statement given by you without promise of reward, threat or duress so that the true facts may be known in this case?

DM: Yes sir.

MR: O.K. Now you've told me the complete truth as you remember it regarding the events leading up to your making that statement?

DM: Yes sir.

MR: And were you told at any time that your statement would give Willy Richmond a new trial?

DM: Yes I was..

MR: Who told you that?

DM: Mr. Dardis.

MR: Was anybody with Mr. Dardis?

DM: No.

MR: Did he take a tape recorded statement?

DM: No he did not.

MR: Then you didn't see a tape recorder playing?

DM: No.

MR: O.K. Uh, uh, have you at any time during this interview before indicated that you wished an attorney or that you wished to stop talking to us?

DM: No.

MR: O.K. And your full name again?

DM: Daniel Lee McKinney.

The time now is 1105.

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THIS WILL BE A [illegible]ED RECORDED INTERVIEW BETWEEN

AT PIMA COUNTY [illegible]TAL ON SEPT. 3RD, 1973 AT

1535 HOURS. PRESENT DET. REYNA AND DET. HUST

AND REBECCA CORELLA.

Q. REBECCA, would you please state your full name, your age, your address and your date of birth?
A. REBECCA PATINO ROMERO CORELLA, I live at 1022 S. 4th, I was born May 14, 1952.

Q. Okay REBECCA, prior to asking any questions. I have to advise you of your constitutional rights. You have the right to remain silent. Anything that you say can and will be used against you in a court of law. You have the right to the presence of an attorney to assist you prior to questioning and to be with you during questioning if you so desire. If you cannot afford an attorney, you have the right to have an attorney appointed to you prior to questioning. Do you understand these rights?
A. Yes.

Q. Now having been advised of these rights and understanding these rights, will you answer our questions?
A. Yes.

Q. Did you have occasion to be with WILLIE RICHMOND and some other people sometime ago at ERNEST JONES' apartment?
A. Yes.

Q. Did you tell me something today that related to the death of a person in the desert somewhere on Greasewood?
A. Yes, yes, yes.

Q. Could you in your own words go into detail as to how you met this person and the circumstances surrounding the death?
A. I met him at the BIRD CAGE. I have known him quite a while, in fact at the BIRD CAGE. And that night me and him were going over to the house to wait on SHEILA because he know me and SHEILA very well. And WILLIE happened to be around and he bulldogged himself into the car and called me all kinds of names and, anyways, this man was kind of frightened and so I made WILLIE and his girlfriend FAYE leave or go outside or something. And so they did and so we sat around there waiting on SHEILA and SHEILA didn't come. It was about 1:30 and she didn't come. So finally I asked WILLIE if he would leave because the man was scared of him and that, you know.....he wasn't wanted there. WILLIE got upset with me and the man and WILLIE hit me one time and called me names and then he said he was sorry and all of a sudden he said "I'll take the man home." And so, the man was showing him where he lived and all of a sudden WILLIE just took him up on A-Mountain and beat him and hit him with a rock and then he just ran over him with the car.

Q. What car did he ran over him with?
A. With a white stationwagon.

Q. Is this the same white stationwagon that you pulled up in front....or had parked in front of the DESERT SANDS HOTEL the evening you were arrested?
A. Yes.

Q. What is FAYE'S last name?
A. I don't know her last name, all I know is that she's a runaway from transition home on 5th and Dodge.

Q. And could you give me a description of her?
A. She's kind of short like me, she's got dishwater hair, long like mine. She's got kind of like big eyes. That's about it. She looks young, she looks her age.

Q. And where is she presently staying?
A. With BERTHA GIBSON in the REFORMAS.

Q. In the Reform area?
A. Yes.

Q. And what is the description of the person that was taken out in the desert and beaten to death?
A. He was a Mexican dude and he was maybe 5'7". He was going to Pima College. I know him real good, he was going to Pima College at the time.

Q. Did he have a mustache or glasses or anything?
A. He had a mustache.

"Exhibit IIB"

Q. Do you know if he was a veteran?
A. No, I don't.

Q. Did he have any physical defects, did he walk with a limp or anything?
A. Oh, yes. He said he had something wrong with his leg. He said he had something wrong with his legs and he couldn't run that fast. He had something wrong with his legs, said he got them hurt before. I think, in fact, I think he said he was in the service before. He couldn't walk, run too good with his legs because he had something wrong with his legs.

Q. And you did personally witness all this incident, is that correct?
A. Yes.

Q. And what property was taken from this person?
A. WILLIE took his money and his watch, I think it was his watch he took.

Q. And what did he do with the watch and wallet?
A. He took everything that he wanted out of the wallet and the watch, I don't know what he did with that.

Q. Were there any credit cards involved at all that you know of?
A. No, not that I know of.

Q. And how much money did he get, do you recall?
A. I think he had about $50.

Q. And the wallet was disposed of in what manner?
A. He just threw it out the window in the desert.

Q. In the immediate proximity of where this occurred?
A. Yes.

Q. And since that time, have you had any defects with that vehicle?
A. What do you mean, defects?

Q. Has anything operated or functioned differently since this incident occurred with the car?
A. Yes. The muffler on it is rubbing against the tire underneath, I don't know how you call it, but it's rubbing against something and everytime it hits a bump or everytime you turn, it makes a noise.

Q. Did WILLIE have any response to you after this occurred? Did he say anything or threaten anybody about it?
A. Yeah. He said if anybody ever found out about it, that the only two people who could tell on him was me and FAY and we'd be in the same position if we did it, did tell.

Q. Was he driving the car that evening?
A. Yes.

Q. And did you do anything in an attempt to help him or to stop him while he was committing the robbery?
A. I asked him to leave him alone and WILLIE just pushed me and he hit me once and then the next day WILLIE made me and SHEILA and FAY go with him over to CAT JOHNSON's house where they gamble and we made excuse to leave and we left and we went to ERNEST's house to stay there and I think we were there maybe an hour before WILLIE come over. We didn't want to answer the door but finally we answered it or he was going to break it in. He dragged me off the bed and jumped on me and he jumped on FAY and he just, you know, cussed SHEILA out. We did call the police but the police never did come. And ALBERT MURPHY (ph) and ROBERT EARL (ph), I suppose you know them too, they are the two that helped me and SHEILA get away from WILLIE because we had told them to tell WILLIE we were hiding in the bushes. We told them to tell WILLIE that if he didn't give us the car keys and get away from ERNEST's house we were going to call the police.

Q. What was this fellow that was murdered wearing that evening?
A. I think he had some black slacks on and a white shirt, I'm not too sure.

Q. Did he ever say where he lived?
A. No,he didn't.

Q. Did, prior to going up there, did WILLIE mention anything about robbing him or did you ever hear WILLIE threaten that he wanted his money before he struck him? WILLIE just beat him up and took his money?
A. We were driving and all of a sudden WILLIE stopped in the desert and I asked him, what are you doing and he just said, shut up, like that. And all of a sudden he just told [illegible] dude

got out of the car and the dude said, what do you want. He said, get out. He said, I'll out. give you my money, just leave me alone. And WILLIE just started hitting on him. The dude was only maybe 24 years old.

When did he hit him with the rock?
After he knocked him out.

Knocked him down on the ground, then he beat him with the rock? How many times did he hit him with the rock?
About 4-5 times.

And then he took his property, did he do anything, go through his pockets, or what?
Yeah, he went through his pockets and got his wallet and everything and then he , I told him, you can't leave him out here like this, he might die. And WILLIE told me to shut up, that if I said anything about it I'd be the same way and he just ran over the man. He backed up and ran over him.

What did FAY say about all this?
Nothing.

Was she scared, or did she help WILLIE or what?
No, she wasn't scared. She thought WILLIE was a big hero.

Can you describe the location where this occurred?
No, I can't describe it. I could show you.

Do you know how to get there? Ok, how did you get there that night?
We went through A Mountain. Ok, do you know where the park, the center is on A Mountain?

The A Mountain area, right.
Ok, you go further up, all the way up and there is a dead end right in there.

OK, this is past the new high school there?
Yes.

OK, then you go west on a street and the street dead ends by a hill?
Yes.

Did this man ever attempt to do anything to protect himself?
Yes, he tried to hit WILLIE back.

After WILLIE had struck him first?
Well, when he got out the car and WILLIE asked him for his money, he tried to hit WILLIE and WILLIE just knocked him out.

WILLIE did ask him for his money first, did he do it forcefully?
No, he just said, give me all your money, like that. Then that man was trying to put up a fight but he couldn't because I remember when he told me that he had something wrong with his legs.

Do you know how much money was taken?
About $50.

Did you receive any part of that money? Did the other girl, FAY, receive any part of that money?
Whatever she did, it all went to WILLIE.

The only people that were present was WILLIE RICHMOND, FAY and yourself plus the man?
Yes, and then I went home and told SHEILA about it.

So SHEILA knows about it, did WILLIE ever talk to her about it?
No, I told SHEILA about it and I told SHEILA not to tell WILLIE I said anything.

Was anything ever done to the car after this occurred, was the undercarriage washed or scraped off in any way? Did you observe any blood or hair or anything on the undercarriage?
No, I left it just the way it was.

Did you see any damage to the vehicle?
Just, you know, like I said, the muffler has fallen down or something, it's making a noise when you turn or hit a bump, it rubs.

C-8

Q. Do you recall what day of the week this was on?
A. A Saturday, I think.

Q. Do you recall the date at all? Do you recall what month it was in? Today is the third of September, was it last month?
A. Yes.

Q. Then it was in August. Did WILLIE have any weapons other than the rock?
A. No.

Q. And the man was unconscious and then WILLIE started hitting the man with a rock? OK, how many times did he run over the man?
A. Once.

Q. Did he drag the man at all with the car?
A. He just ran over him, just backed up and ran over him and kept on.

Q. Did you see what part of the body he ran over?
A. I didn't even look, no.

Q. OK. You have been aware that we have been using a tape recorder to tape this, am I correct?
A. Yes.

Q. Are you presently under the influence of any drugs or narcotics?
A. No, I'm not right now.

Q. Are you suffering any withdrawal symptoms that would effect your stability as far as your testimony or your thinking goes?
A. No. I'm feeling just fine.

Q. In other words, right now your fine, there's nothing bothering you and you've understood all your constitutional rights, is that correct? And you waived your rights to talk to us voluntarily, right? Would you respond, we can't...
A. Yes.

Q. It doesn't record shaking of the head. Ok, and you agreed to talk to us voluntarily, is that correct?
A. Yes.

Q. And no promises were made at all prior to this interview?
A. Right.

Q. Is this a true and voluntary statement given by you without promise of reward, threat or duress so that the true facts in this case may be known?
A. Yes.

Q. And all the facts you have just given us, would you be willing to testify to in a court of law?
A. Yes.

Q. May we have your full name again please?
A. REBECCA PATINO ROMERO CORELLA.

TERMINATION OF STATEMENT AT 1550 HOURS, SEPTEMBER 3, 1973.

C-9

No. 91-7094

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

WILLIE LEE RICHMOND,

Petitioner,

v.

SAMUEL A. LEWIS, Director, Arizona Department of Corrections; and ROGER CRIST, Superintendent of the Arizona State Prison,

Respondents.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

WILLIE LEE RICHMOND,

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SAMUEL A. LEWIS, Director,
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ROGER CRIST, Superintendent of the
Arizona State Prison,

Respondents.

Respondent's Brief in Opposition raises several new arguments. Those arguments, and the decision in Stringer v. Black, ___ U.S. ___, 1992 WL 40776 (March 9, 1992) which bears directly on this case, require a brief response.

A. The Arizona Supreme Court Plurality's "Heinous" Finding.

1. Respondent attempts to avoid the argument that the "heinousness" determination in this case is unconstitutional under Maynard v. Cartwright, 486 U.S. 356 (1988), arguing that Petitioner's sentence did not "rest" on this finding, because "[o]nly two of the five Justices of the Arizona Supreme Court found the especially heinous factor applicable ...." Resp. Br. Opp. 16. This argument defies logic.

There are five Justices of the Arizona Supreme Court. Three votes are required for decision. In this case, two Arizona Justices--whom the opinions call the "majority"--voted to affirm the death sentence on the basis that the crime was "heinous" or "depraved," although not "cruel". Pet. App. C-9-10. They did not indicate whether they would have voted differently--to reverse the death sentence, or to remand for resentencing--if this aggravating factor was eliminated from their consideration. Three Justices found the crime was not "especially heinous." Two of these Justices voted to affirm, because there were other valid aggravating factors. Pet. App. C-12-13. The third Justice--the only one who both recognized the invalidity of the "heinous" finding here, and independently reweighed aggravation and mitigation after excluding that factor--voted to reduce Petitioner's sentence to life imprisonment.

Without the concurrence of both two-Justice pluralities, plainly the outcome of this case would have been different. Either group, together with the dissenting Justice, would have formed a majority to reverse or vacate Petitioner's sentence of death. Petitioner has argued, and maintains, that the decisions of both pluralities fell into constitutional error--the "majority" under Maynard, the concurrence under Clemons v. Mississippi. Because both groups of Justices were necessary to affirm Petitioner's sentence, by simple mathematics, if either of those arguments is correct, Petitioner's sentence cannot stand.

In similar situations, when the votes of state court judges necessary to make up a majority are based on a premise that is invalid under federal law, the Court has found that remand is necessary to avoid the risk that the state court would have decided differently if it had correctly understood and applied the law. United Airlines v. Mahin, 410 U.S. 623, 632 (1972). Cf. California v. Krivda, 409 U.S. 33, 35 (1972); Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 443 (1952). The Eighth Amendment underscores that requirement where the state court involved is the final decisionmaker in a capital case. Clemons v. Mississippi, 110 S.Ct. 1441 (1990); Eddings v. Oklahoma, 455 U.S. 104 (1982); cf. Mills v. Maryland, 486 U.S. 367 (1988). Respondent's argument that this error can be ignored because some state court judges reached the same conclusion for different (and, we submit, separately erroneous) reasons is supported by neither law nor logic.

2. Contrary to Respondent's attempt to restate this issue, Petitioner certainly does "challenge the limiting construction of the especially heinous factor applied by Justices Hays and Holohan." Resp. Br. Opp. 17. See Petition at 19-22. The first question presented here clearly includes that point, but is not limited to it, because the decisions below raise even broader issues about state appellate decisionmaking in capital cases.

That question focuses on the failure of the Arizona Courts, at any stage of this case, to clearly resolve the factual issue of the identity of the person who caused the victim's death. To avoid it, Respondent attempts to patch together several trial level findings to persuade this Court that there was such a resolution of that critical factual issue in the state trial court. Resp. Br. Opp. 19-25.[1]

The linchpin of Respondent's present argument is the trial court judge's recitation of the F(6) aggravating factor: "the defendant did commit the offense in this case in an especially heinous and cruel manner." Resp. Br. Opp. 19; see Pet. App. D-3. Respondent argues that "the only offense to which that circumstance applied was first degree murder, [so] the trial court clearly was saying that Willie Lee Richmond committed the murder." Ibid. But, as the trial court also noted, in this case the charge included first degree felony murder. See Pet. App. D-5. Under Arizona's felony murder rule, all participants are equally guilty of "the offense," regardless of who actually causes death. Thus, the trial court also found as mitigating

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[1]Respondent has taken different positions on this elsewhere. It initially conceded in the Court of Appeals that "it is true that the trial court did not make a specific finding on th[e] question" of whether Petitioner "killed, intended to kill, or contemplated death would occur." Resp. Brief at 40, Richmond v. Ricketts, 9th Cir. No. 84-2809. In a published official description of the case, Profiles of Arizona Death Row Inmates (November 1991) at 68, the Respondent Attorney General has similarly acknowledged that the evidence shows the car was driven by "either Richmond or one of the girls."

factors "that Rebecca Corella was involved in the offense" and "that Faith Irwin was involved in the offense," although neither was charged with a crime. Pet. App. D-4.

Stating its point another way, Respondent asserts "[o]ne cannot commit an offense in a particular manner unless one commits the offense." Resp. Br. Opp. 19. That sounds plausible, but it was not the law of Arizona at the time of Petitioner's sentencing. State v. Tison, 633 P.2d 355, 364 (Ariz. 1981), explicitly "reject[ed] the appellant's argument that this aggravating circumstances can be found only if he actually committed the murders." See Tison v. Arizona, 481 U.S. 137, 160 n.3 (1987) (dissenting opinion of Justice Brennan). The trial court's conclusory recitation of this aggravating factor was made without any of the later-announced limiting constructions of its facially vague terms. See Pet. App. A-21. It cannot be read to imply any specific determination about Petitioner's actions or intent.

Respondent also makes a second line of argument--also new in this Court--out of the trial court's failure to find the G(4) mitigating circumstance. Resp. Br. Opp. 21. The subsection setting forth that factor reads as follows:

> The defendant could not reasonably have foreseen that his conduct ... would cause, or would create a grave risk of causing, death to another person.

Under Arizona law, the defense has the burden to establish this, or any other mitigating factor. Ariz. Rev. Stat. §13-703(C); see

Walton v. Arizona, 110 S.Ct. 3047, 3055 (1990). At most, therefore, Respondent's argument establishes that the trial court found that the defense had not proved, by a preponderance of the evidence, Petitioner "could not reasonably have foreseen" Bernard Crummett's death. That hardly amounts to a finding that, beyond a reasonable doubt, Petitioner himself caused that death.

Respondent's argument therefore reduces to a dispute over the relative strength of the evidence as to who was driving the getaway car at the fatal moment. Resp. Br. Opp. 22-25. We do not agree with its characterizations, but we will not answer them here; for, of course, our point is not that the state courts misread the evidence in this case. Our point is that no state judge clearly made this critical finding, before sentencing Petitioner to death on a ground that cannot stand without it.

The "heinous" aggravating factor which the "majority" Arizona Justices weighed in the statutory balance in favor of death, was supposed to describe "the mental state and attitude of the offender as reflected in his ... actions." Pet. App. C-8.[2] To apply such a factor without determining what the defendant actually did is intolerably "vague and imprecise, inviting arbitrary and capricious application of the death penalty in violation of the Eighth Amendment," the antithesis of "the

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[2]The original sentence says "words and actions ...." See Petition 18; Pet. App. C-8. We have here omitted the reference to "words" because there has never been any suggestion that anything Petitioner said made this crime "heinous."

precision that individualized consideration demands under the Godfrey and Maynard line of cases." Stringer v. Black, 1992 W.L. at 40776*3.

In this regard, Stringer reinforces the teachings of Parker v. Dugger, 111 S.Ct. 731 (1991)--which Respondent never mentions --that "[m]eaningful appellate review requires that the appellate court consider the defendant's actual [conduct]", or base its decision on trial level findings that were actually made. 111 S.Ct. at 738-39. Certiorari is warranted here because the Court of Appeals endorsed a review by the "majority" Arizona Justices, which included neither of those things.

B. The Clemons v. Mississippi Issue.

1. Respondent acknowledges that "it is the Arizona Supreme Court's usual practice to remand a case for resentencing when it eliminates an aggravating circumstance,"[3] but argues that this is merely a matter of "discretion" with no federal constitutional implications. Resp. Br. Opp. 26, 27. This misreads Petitioner's arguments, and Arizona law.

Respondent misconstrues Arizona law by adopting the panel's rationale: that the requirement of "sufficiently substantial" mitigation implies no weighing of aggravating against mitigating

[3]For instances in which the Arizona Supreme Court has elected to remand for resentencing in this situation, see, e.g., State v. Schaaf, 819 P.2d 909 (Ariz. 1991); State v. Hinchey, 799 P.2d 352 (Ariz. 1990); State v. Lopez, 786 P.2d 959 (Ariz. 1990); State v. Wallace, 728 P.2d 232 (Ariz. 1986); State v. Rossi, 706 P.2d 371 (Ariz. 1985); State v. Smith, 665 P.2d 995 (Ariz. 1983); State v. Gillies, 662 P.2d 1007 (Ariz. 1983).

factors. Resp. Br. 30-31. Tellingly, Respondent does not cite a single Arizona decision to support this; it simply ignores the numerous contrary state authorities Petitioner has compiled. Petition 25-26. Respondent does cite several cases in which the Arizona Supreme Court has decided not to remand for resentencing by the trial judge. Resp. Br. Opp. 26-27. But these cases do not support Respondent's broader argument, because in each of them the Arizona Supreme Court said it had conducted an independent reweighing of the valid aggravating and mitigating circumstances, as Clemons v. Mississippi, 110 S.Ct. 1441 (1990) held it could do. The two concurring Justices in this case--whose actions give rise to this issue--did not do that.

2. Respondent misses this point, and assumes that Petititioner's Clemons argument depends on the separate claim that the Arizona Supreme Court "majority's" "heinousness" finding is invalid. Resp. Br. Opp. 31ff. As we have tried to make clear, Clemons is relevant here independently of the Maynard issue, because of the position taken by the two concurring Arizona Justices who agreed that the crime could not be found to be "heinous." See Petition at 24 n.13. Those two Justices voted to affirm Petitioner's death sentence, despite their position that this aggravating factor did not exist, without any indication that they had independently determined the mitigating circumstances were not "sufficiently substantial" in relation to the two statutory aggravating circumstances which remained.

Instead, they used the kind of "automatic affirmance" approach forbidden by Clemons, saying they affirmed because Petitioner's prior record "places him above the norm of first degree murderers." Pet. App. C-12.

In other words, although the concurring Justices agreed that "the sentencing body [was] ... told to weigh an invalid factor in its decision," they conducted neither a "constitutional harmless error analysis or reweighing at the ... appellate level ... to guarantee that the defendant received an individualized sentence." Stringer v. Black, 1992 W.L. 40776*6. Instead, much like the Mississippi court in Stringer, they affirmed the death sentence essentially on the ground, that "the evidence fully support[ed] ... statutorily required aggravating circumstances ... and the death sentence was not disproportionate to sentences imposed in other cases." Id. at *3 (internal quotations omitted). Compare Pet. App. C-12-13. The one Justice who agreed that the crime was not "heinous," but reweighed the remaining aggravating factors against the evidence in mitigation, reached the opposite result, and voted to reduce Petitioner's sentence to life imprisonment. Id. at C-13-14.

Although the action of the two concurring Justices in this case may be an aberration from Arizona's usual approach to appellate capital sentence review, it has nonetheless left Petitioner under an unconstitutional death sentence. Of broader import, the Ninth Circuit's reconstruction of Arizona law to

endorse that aberration has created confusion and a direct conflict between the lower state and federal courts. As we have demonstrated (Petition at 24-6), the Arizona Supreme Court, "which is the final authority on the meaning of [Arizona] law, has at all times viewed its sentencing scheme as one in which aggravating factors are critical in the ... determination whether to impose the death penalty." Stringer v. Black, 1992 W.L. 40776 The Ninth Circuit panel "made a serious mistake" because it "ignored the ... [Arizona] Supreme Court's own characterization of its law and accorded no significance to the fact that in [Arizona] aggravating factors are central in the weighing phase of a capital sentencing proceeding." Id. at *9.

Certiorari should be granted here to correct that mistake and resolve this matter--which is "of critical importance" (id. at *6) in this case and in all capital cases in Arizona.

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No. 91-7094

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v.

SAMUEL A. LEWIS, Director,
Arizona Department of Corrections; and
ROGER CRIST, Superintendent of the
Arizona State Prison,

Respondents.

CERTIFICATE OF SERVICE

TIMOTHY K. FORD hereby certifies:

That on the 11 day of March, 1992, I mailed a copy of Petitioner's Reply to Brief in Opposition to Petition for Writ of Certiorari, by United States Mail, postage prepaid, to:

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March 11, 1992

BY FEDERAL EXPRESS

Hon. William K. Suter, Clerk
Supreme Court of the United States
1 First Street N.E.
Washington, D.C. 20543

Re: Richmond v. Lewis, No. 91-7094

Dear Mr. Suter:

Enclosed please find an original and nine copies of Petitioner's Reply to the Brief in Opposition in this case, and a Certificate of Service.

Thank you for your attention to this.

Sincerely,

Timothy K. Ford

TKF/ls
Enclosures

cc: Jack Roberts, Esq.
Carla Ryan, Esq.
Willie Lee Richmond

NO. 91-7094

IN THE SUPREME COURT OF THE UNITED STATES
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ON WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

RESPONDENTS' SUPPLEMENTAL BRIEF

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INTRODUCTORY COMMENT

This Court's Rule 15.7 permits any party to file a supplemental brief when new authority has issued after that party's last pleading was filed. When respondents filed the response to the petition for a writ of ceritorari on February 18, this Court had not decided Stringer v. Black, ___U. S.___ 1992 Wl 40766 (Mar. 9, 1992). In view of the Court's decision in that case, and the great reliance petitioner places upon it in his reply of March 11, respondents respectfully file this supplemental pleading distinguishing this case from Stringer.

I

Three of the five Arizona Supreme Court justices who considered Richmond's case held that the especially heinous circumstance did not exist. Therefore, his sentence of death was not imposed on the basis of that circumstance. Richmond v. Ricketts, 640 F. Supp. 767, 795-96 (D. Ariz 1986) (Richmond had no standing to challenge his sentence on the basis of the especially heinous factor because the majority of the Arizona Supreme Court found it did not exist.) This fact alone immediately distinguishes this case from Stringer, where the jurors did find the circumstance -- later held invalid for vagueness -- to apply.

II

The majority of judges on the Arizona Supreme Court who did not find the especially heinous factor applicable, did independently reweigh the remaining two aggravating circumstances

against the mitigation. In a section titled "Independent Review," Justice Holohan, speaking for the entire court, said:

> In death penalty cases, this court will conduct an independent examination of the record to determine for ourselves the presence or absence of aggravating and mitigating circumstances and the weight to give each. We also independently determine the propriety of the sentence.

State v. Richmond, 136 Ariz. 312, 320, 666 P.2d 57, 65 (1983). Although Justices Cameron and Gordon did not find the especially heinous factor applicable, they did agree that Richmond's prior history of violent crimes -- based on the unchallenged circumstances established by the armed kidnapping and another first-degree murder -- warranted the death penalty:

> The criminal record of this defendant, however, clearly places him above the norm of first degree murderers. He has been convicted of another first degree murder and a kidnapping, each arising in separate incidents. This history of serious violent crime justifies the imposition of the death penalty.

State v. Richmond, 136 Ariz. at 323-24, 666 P.2d at 68-69. Thus, Richmond is simply wrong at page 8 of his reply when he says that Justices Cameron and Gordon, who did not find the especially heinous factor, voted to affirm the sentence "without any indication that they had independently determined the mitigating circumstances were not 'sufficiently substantial' in relation to the two statutory aggravating circumstances which remained."

Richmond is saying that this Court should presume that Justices Cameron and Gordon did not independently review and reweigh the aggravation and mitigation because they did not explicitly say so in their concurrence of the death penalty. This Court has already said in another case from Arizona that the Court will presume that judges know the law and apply it to the facts. Walton v. Arizona, ___U.S.___, 110 S. Ct. 3047, 3057, 111 L. Ed. 2d 511 (1990). Justice Holohan announced the already familiar standard of independent review; it is specious to argue that Justices Cameron and Gordon must be presumed to have ignored it because they did not re-announce it in their concurrence in the penalty. Justice Cameron authored at least 21 opinions for the Arizona Supreme Court in which he specifically noted that court's duty to independently examine aggravation and mitigation and to determine the weight to give each. Justice Gordon wrote at least 14 opinions for that court reiterating that same obligation. (See Appendix.)

The Arizona procedure whereby the Arizona Supreme Court independently weighs the evidence to determine the propriety of the death sentence distinguishes the instant case from Clemons v. Mississippi, 494 U.S.___, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), where this Court could not tell whether the Mississippi Supreme Court had held harmless the jurors' consideration of a concedely vague circumstance, or had simply eliminated the circumstance on appellate review and

reweighed the aggravation and mitigation. It is clear from Arizona precedence that Justices Cameron and Gordon were saying that, even without the especially heinous factor, the remaining aggravation was sufficient to warrant the death penalty.

III

The other crucial distinction between Stringer and Richmond's case is that there was no question that the aggravating circumstance in Stringer was unconstitutionally vague. The instruction given to the Mississippi jurors, with no further limiting construction of the language, violated this Court's holding in Godfrey. By contrast, this Court has upheld the Arizona Supreme Court's limiting construction of the especially heinous, cruel or depraved circumstance. Walton v. Arizona, 110 S. Ct. 3047, 3056-57. Judicial sentencing is precisely why this Court distinguished the Arizona circumstance from those condemned in Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988), and Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980). Id.

Petitioner's challenge in this Court is that two Arizona justices incorrectly applied a circumstance this Court has already held constitutional. In other words, he simply disagrees with the Ninth Circuit's application of the rational factfinder test this Court said was the proper standard of review in Lewis v. Jeffers, 497 U.S.___, 110

S. Ct. 3092, 111 L. Ed. 2d 606 (1990). That is a matter of state law to which the Ninth Circuit has properly applied this Court's test in Jeffers.

CONCLUSION

Despite petitioner's attempts to convince the Court to the contrary, none of the concerns of Stringer or Clemons is present in this case and the Court should deny certiorari.

Respectfully submitted,

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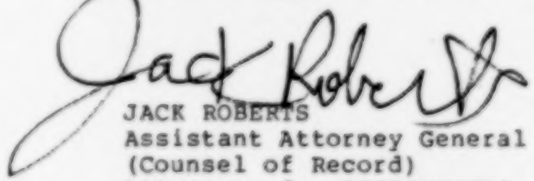

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APPENDIX

In the following cases, Justice Cameron, writing for the court, expressed the duty of the Arizona Supreme Court to independently examine aggravation and mitigation and the weight to give each. State v. Greenway, 101 Ariz. Adv. Rep. 7, 11, 15 (Dec. 2, 1991); State v. White, 168 Ariz. 500, 510, 512, 815 P.2d 869, 879, 881 (1991); State v. Fulminante, 161 Ariz. 237, 254, 778 P.2d 602, aff'd, ___ U.S. ___, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); State v. Vickers, 159 Ariz. 186, 532, 544-45, 768 P.2d 1177, 1189-90 (1989), cert. denied, ___ U.S. ___, 110 S. Ct. 3298, 111 L. Ed. 2d 806 (1990); State v. Beaty, 158 Ariz. 232, 242, 762 P.2d 519, 529 (1988), cert. denied, ___ U.S. ___, 109 S. Ct. 3200, 105 L. Ed. 2d 708 (1989); State v. McMurtrey, 151 Ariz. 105, 108, 110, 726 P.2d 202, 205, 207 (1986), cert. denied, 480 U.S. 911 (1987); State v. Castaneda, 150 Ariz. 382, 395, 724 P.2d 1, 14 (1986; State v. Correll, 148 Ariz. 468, 478, 715 P.2d 721, 731 (1986); State v. Poland (Michael), 144 Ariz. 412, 415, 698 P.2d 207, 210 (1985), aff'd, 476 U.S. 147 (1986); State v. Poland (Patrick), 144 Ariz. 388, 404, 698 P.2d 183, 199 (1985), aff'd, 476 U.S. 147 (1986); State v. Clabourne, 142 Ariz. 335, 347, 690 P.2d 54, 66 (1984); State v. Summerlin, 138 Ariz. 426, 435-36, 675 P.2d 686, 695-96 (1983); State v. Smith (Robert), 138 Ariz. 79, 85, 673 P.2d 17, 23 (1983), cert. denied, 465 U.S. 1074 (1984); State v. Lambright, 138 Ariz. 63, 75, 673 P.2d 1, 13 (1983), cert. denied, 469 U.S. 892 (1984); State v. Harding, 137 Ariz. 278, 293, 670 P.2d 383, 398 (1983), cert denied, 465 U.S. 1013 (1984); State v. Gretzler, 135 Ariz. 42, 54, 659 P.2d 1, 13, cert. denied, 461 U.S. 971 (1983); State v. Blazak, 131 Ariz. 598, 602-04, 643 P.2d 694, 698-700, cert. denied, 459 U.S. 882 (1982); State v. Watson, 129 Ariz. 60, 62-63, 628 P.2d 943, 945-46 (1981), cert. denied, 456 U.S. 981 (1982); State v. Steelman, 126 Ariz. 19, 23, 27, 612 P.2d 475, 479, 483, cert. denied, 449 U.S. 913 (1980); State v. Madsen, 125 Ariz. 346, 352, 609 P.2d 1046, 1052, cert. denied, 449 U.S. 873 (1980); State v. Brookover, 124 Ariz. 38, 42, 601 P.2d 1322, 1326 (1979).

In the following case, Justice Gordon, writing for the court, expressed the duty of the Arizona Supreme Court to independently examine aggravation and mitigation and the weight to give each. State v. Lavers, 168 Ariz. 376, 391, 814 P.2d 333, 348 (1991); State v. Hinchey, 165 Ariz. 432, 439, 799 P.2d 352, 359 (1990); State v. LaGrand (Walter), 153 Ariz. 21, 34, 734 P.2d 563, 576, cert. denied, 484 U.S. 872 (1987); State v. Rossi, 146 Ariz. 359, 365, 706 P.2d 371, 377 (1985); State v. Hooper, 145 Ariz. 538, 550, 703 P.2d 482, 494 (1985), cert. denied, 474 U.S. 1073 (1986); State v. Bracy, 145 Ariz. 520, 536, 703 P.2d 464, 480 (1985), cert. denied, 474 U.S. 1110 (1986); State v. Nash, 143 Ariz. 392, 404, 694 P.2d 222, 234, cert. denied, 471 U.S. 1143 (1985); State v. Fisher, 141 Ariz. 227, 251-52, 686 P.2d 750, 774-75, cert. denied, 469 U.S. 1066 (1984); State v. McCall, 139

Ariz. 147, 160, 677 P.2d 920, 933 (1983), cert. denied, 467 U.S. 1220 (1984); State v. McDaniel, 136 Ariz. 188, 200, 665 P.2d 70, 82 (1983); State v. Zaragoza, 135 Ariz. 63, 68, 659 P.2d 22, 27, cert. denied, 462 U.S. 1124 (1983); State v. Ortiz, 131 Ariz. 195, 207, 639 P.2d 1020, 1032 (1981), cert. denied, 456 U.S. 984 (1982); State v. Britson, 130 Ariz. 380, 387, 389, 636 P.2d 628, 635, 637 (1981); State v. Mata (Luis), 125 Ariz. 233, 242, 609 P.2d 48, 57, cert. denied, 449 U.S. 921 (1980).

No. 91-7094

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

WILLIE LEE RICHMOND,
Petitioner,

v.

SAMUEL A. LEWIS, Director,
Arizona Department of Corrections, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 15, 1992
CERTIORARI GRANTED MARCH 30, 1992

TABLE OF CONTENTS

CHRONOLOGICAL LISTING OF RELEVANT DATES

August 26, 1973	—Bernard Crummett killed.
September 21, 1973	—Information filed.
January 15, 1974	—Trial commences.
February 5, 1974	—Jury verdict returned.
February 25, 1974	—First mitigation hearing commences.
February 27, 1974	—Trial court imposes sentence of death.
December 20, 1976	—Arizona Supreme Court affirms.
April 21, 1978	—U.S. District Court vacates death sentence.
March 13, 1980	—Trial court reimposes sentence of death.
May 12, 1983	—Arizona Supreme Court affirms on second appeal.
November 14, 1983	—Certiorari denied on second appeal.
July 11, 1986	—U.S. District Court dismisses habeas petition.
December 26, 1990	—Court of Appeals affirms.
October 17, 1991	—Court of Appeals denies rehearing.

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

The 21 day of Sept. 1973

No. A-24252

STATE OF ARIZONA,
Plaintiff,

vs.

WILLIE LEE RICHMOND,
Defendant(s).

INFORMATION

The County Attorney of the county of Pima, in the name of the state of Arizona, and by its authority accuses

WILLIE LEE RICHMOND

and charges that in Pima County:

COUNT ONE
(MURDER—1st degree)

On or about the 26th day of August 1973, WILLIE LEE RICHMOND killed BERNARD THOMAS CRUMMETT in violation of A.R.S. Section 13-451, 13-452 and 13-453.

COUNT TWO
(ROBBERY)

On or about the 26th day of August 1973, WILLIE LEE RICHMOND robbed BERNARD THOMAS CRUMMETT, all in violation of A.R.S. Section 13-641 and 13-643A, as amended.

DENNIS DECONCINI
Pima County Attorney

By /s/ David G. Dingeldine
DAVID G. DINGELDINE
Chief Deputy Atty.

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

(Caption Omitted in Printing)

[EXCERPT OF TRIAL TESTIMONY OF DR. JAMES HOLKA, TRANSCRIPT DATED JANUARY 15, 1974, VOL. I]

* * * *

[153] DIRECT EXAMINATION CONTINUED BY MR. HOWARD:

Q I believe the question I asked, Doctor, last was the procedure that you follow in an autopsy and let me be more specific. You make a gross examination of the body before you really do anything, Doctor, in the course of an autopsy?

A Yes. We also examine the effects of—the shoes, the clothing, whatever personal effects are delivered with the body to the morgue facility, and then the body is examined, a gross examination. On occasion, photographs are taken, and on other occasions x-rays of the body are taken. And then the examination is continued by the disection of the body and gross examination of the internal organs follow in which sections [154] of these are made and are preserved and prepared for microscopic examination which follow some days later. And then, at the same time, the gross examination is made the body fluids or foreign substances are removed and held for examination—toxicological examinations or other identification and at a later time, whether the microscopic identification or toxicological these are incorporated into the biological examination.

Q In this particular case you have a copy of that report before you, Doctor, to refer to?

A Yes.

Q What did your gross examination—verbal examination of the body reveal, Doctor Holka?

A There was considerable evidence of compressive fluorescein in the skull with the bursting of skin and antrusion of skull contents that included some fragments of skull which were missing as well as the brain. In addition to these, there were other marks of force applied to the trunk, and these were attended by abrasions and in a linear fashion as well as again a bursting kind of separation of the skin [155] and soft tissue of the extremities. In addition to these, not incurred at this time, but at some time was evidence of surgical intervention on the legs of the victim with numerous suture wounds which were well healed. Also observed was needle puncture marks which was on the right forearm of the victim, the age of which I could not determine because of the other more recent evidence of prior surgery which supervened. This concluded the gross examination prior to this photograph having been taken and x-rays as I described generally.

In the internal examination there was evidence of fractures of the left thorax by possible anterior which were not attended by subcutaneous soft tissue hemorrhage. Similar tissues in the organs of the abdomen or abdominal cavity. There was no significant hemorrhage and for a person for his estimated age, they were consistent with very good health.

There was no evidence of hemorrhage externally into the abdominal cavity or internally into the body wall. Similarity in the upper extremities, these bursting lacerations that I described were not attended by hemorrhage either superficially or deep within the wound. And the [156] abraded surfaces were exuding only a serus type fluid and there was no blood associated with it.

Q And what conclusion, if any, did you draw from the examination of the trunk of the body, the gross examination and the nature of those wounds?

A From the comparison of the external examination with the internal examination, and the absence of evidence of hemorrhage which one would have expected by excessive

force, I made the determination that the victim was probably already dead at the time that those injuries were inflicted to the trunk—were inflicted. That the principal cause of death, was therefore compressive injury to the skull and its contents.

Q Now, you mentioned, Doctor, I think surgical wounds that were well healed in the leg area. Does that—did those wounds tell you anything about this individual? Did you recognize those wounds?

A To my experience in the Air Force, these were the wounds very commonly inflicted by shrapnel.

Q Did you have experience yourself in observing that type of wound when you were in the Air Force?

[157] A Yes.

Q I show you what has been marked as State's Exhibits # 18, 19, and 20, Doctor, and just examine them if you will, and tell me if this is the individual's body upon whom you performed this autopsy?

A Yes.

Q Doctor, were you able to draw any conclusions as to how the crushing injury to the brain and the other injuries to the body—trunk of the body might have been caused?

A I concluded from an examination of the scene, the gross examination of the internal examination, that these were probably a result of excessive force. I would conclude further that this was a wheel of a car.

Q And Doctor, were you able to reach any conclusion as to whether this individual—this individual was run over by a car one time or more than one time?

A I concluded that it was more than one direction of force from the compression marks of the vehicle times body—that these two, at least two directions.

Q And was there anything specific in your evidence, in your internal examination [158] which would support that conclusion?

A Yes, the force applied to the—had been separately applied to the trunk of the body and that was supported by the absence of hemorrhage into the internal organs.

Q Have you explained to the jury why you draw that conclusion from those facts?

A Hemorrhages usually depend upon an act of circulation. That circulation ceases whenever there is an interruption of circulation either because of the interference or on the basis of the heart, the pump or the circulatory system, or because of exanguination or place of last loss of blood from some other site. The place of loss of blood would have been from the skull injury.

Q Did you draw a conclusion, then, from that that the injury to the thoracic cavity is that what I call a broken rib, Doctor?

A Yes.

Q That that injury was sustained most probably after the crash injury?

A Yes, that's right.

Q Now, by the use of any of these photographs, Doctor, # 18, 19, or 20, would you be able to illustrate to the jury, and just answer [159] this question yes or no, what you mean when you say that there were two directions of force indicated in the injuries which led you to the conclusion that the body may have been run over more than one time?

A Yes.

MR. HOWARD: I would move at this time Your Honor, for the admission of State's Exhibit # 18, 19, and 20.

THE COURT: Perhaps it might be necessary to lay foundation. They were taken at the time of the autopsy.

Q Does the body appear here in substantially the same condition it did at the time that you made your gross examination of the exterior of the body?

A That's right.

MR. HOWARD: I believe I did ask him—I move for the admission of State's Exhibits #18, 19, and 20.

THE COURT: Other than the objection already stated, do you have any further objection?

MR. BOLDING: No, no further objection, Your Honor.

THE COURT: ≠ 18, 19, and 20 may be admitted.

[160] Q Doctor, holding those photographs up, you can perhaps illustrate by pointing out the injuries you are referring to, and showing the jury how you drew the conclusion that there is two directions of force illustrated there?

A In the first photograph which gross examination—you will notice that there is a linear direction of force going across the trunk over the left thoracic cavity and abdominal cavity to the right side.

Less clearly established, I think in this photograph, but better seen here is a direction of force.

Q May I interrupt you a minute? The first photograph you are referring to is State's Exhibit ≠ 18 and you are now holding State's Exhibit ≠ 20?

A In ≠ 20 the linear direction of force is in the opposite direction or it intersects the lines of force applied to the trunk and there is a separate direction of force applied to the right shoulder. And if these two lines of force could be projected into space, then the focus would come here at a point where they would intersect and they would not parallel, I should expect from parallel wheels of a car.

[161] And this photograph, ≠ 19, it gives you a little more perspective in the direction of force, which is better seen in the close-up of the lead and posing forces applied to the trunk.

Q Alright. Thank you, Doctor, what were—were there x-rays, Doctor, in this particular case of specifically the lower extremities?

A Yes. I wanted to demonstrate the metallic fragments which I expected to find in the lower extremity.

Q Do the x-rays demonstrate that?

A Yes, they do.

Q Did they demonstrate anything as far as fractures of the lower extremities?

A No, these appeared to be in the soft tissue injuries so far as we could tell at this time.

Q Was there any major trauma found to the lower extremities of the body?

A Recent trauma?

Q Yes.

A Yes. There was lacerations about the knees.

Q Is there anything in your finding, Doctor, inconsistent with the usual findings in a case of a pedestrian being struck by an [162] automobile?

A If by a pedestrian, you mean the deceased was in a position—

Q Walking, yes.

A Yes, usually the lower extremities are fractured and there is considerably more trauma administered to the abdominal cavity, and that would be incurred by a bumper or the proportion of the hood of the car.

Q What, if anything, of significance did the laboratory examination of the tissues in this case reveal?

A The toxicological examination—the only thing of significance that was revealed was the presence of a small amount of alcohol.

Q Would that be significant, Doctor, in terms of possible intoxication?

A It does not reach the definitive limits of intoxication.

Q Was there any evidence of any other type of drugs from the examination of any of these fluids?

A No sir, there was not.

Q Doctor, from your examination at the scene and also from autopsies were you able to reach a conclusion as to the approximate time of [163] death of the victim?

A The approximate time of death was based upon my examination at the scene, and at that time there was only the beginning of rigor mortis and this would be consistent with approximately six hours to the time of death which was inflicted.

Q From the time that you were at the scene, which was approximately what time Doctor?

A I was present at the scene at 7:00 in the morning. That would put the time of death at about one to twelve that preceeding morning.

Q And how definitely is that method of determination?

A That is an approximation. It falls within about two hours. It depends upon the temperature at the scene and various considerably.

Q Could you explain to the jury what rigor mortis is?

A Rigor mortis, it is the stiffening due to the release of enzymes in the muscle, and this is a process of individual cells as the muscle dies these sometimes are released and the stiffening causes contraction of the muscle. They are related to time and proceeds to a point and then relaxation of the same muscle again as decomposition of the muscle occurs. [164] So it is a two-fold process, and we took it approximately twelve hours after death and usually passes at about 24 hours after death. This is somewhat dependent upon temperatures because delay prolonged in cold temperatures can be hastened in hot temperatures.

Q So, depending on what the temperature was during that preceeding however many hours, the state of rigor mortis would differ?

A That's right.

Q Doctor, calling your attention to the—specifically to the head injury and to your procedure with regard to the examination at the autopsy of the head, can you tell how you examined those injuries? In other words, where do you cut? Did you have to cut, or what did you do?

A After the gross external examination the scalp is reflected and the examination of the underlining soft tissue grossly is performed. And that is followed by an incision into the skull, which is partially removed and the internal contents of the skull cavity are then examined grossly and then the brain itself is removed and a microscopic examination of the brain follows.

[165] Q Did you find anything in the course of that procedure which showed you injuries that might have been sustained or which appeared to have been sustained in a different manner other than a crush injury that was previously described?

A Since the victim's skull was in a fragmented condition, the gross examination suggested a different type of injury rather than the bursting injury due to a compressive force. There appear to be a compressed stellic wound over the forehead and the scalp in this area was particularly reflected and examined and revealed two depressed puncture type wounds into the bone of the culvarium skull itself. And there was not attended by significant hemorrhage in this area.

Q And in that particular wound appear to be—

MR. BOLDING: Your Honor—I'm sorry go ahead.

Q Appear to be inconsistent with the crush injury which you previously described?

A Yes, this external examination of the laceration showed a different direction of angle, a depressive force rather than a bursting force [166] and subsequent examination of the skull itself showed a depressed puncture type wound rather than the fragmentation that was depressive in other parts.

Q Did you formally conclude, Doctor, as to how that particular or those particular injuries might have been caused or—

A That was—suggested at least two different kinds of force. One in which there was external application of a pointed object to the skull rather than flat, and more expanded impression that one would expect with the tire.

Q Is that type of injury, could that have been caused by a rock—

MR. BOLDING: Object, Your Honor, of course that if obviously leading. That is the answer he wants to that type of a question. What it could have been.

THE COURT: Objection overruled. You may answer it.

A Yes.

Q Doctor, taking into consideration the crush injury and the manifestation of the crush injury to the skull,

could there have been other trauma applied to the skull which was masked by these other massive injuries?

[167] MR. BOLDING: I object to that. The test is not—It could have been the test is reasonable medical probability and anything possible when you object to it for that reason.

THE COURT: Objection overruled. You may answer it.

A You are asking that other forces, other injuries could have been applied to the skull which were masked?

Q By the crushing injury.

A Yes, that is possible.

Q You remember the possible height and weight, Doctor, or could you refresh your memory from your report concerning that?

A The height was recorded at approximately 5′5″, the weight 143 pounds.

* * * *

[168] CROSS EXAMINATION BY MR. BOLDING:

* * * *

[169] Q Let's see, Doctor, you talked about two different kinds of force, and a pointed object in response to the prosecutor's questions. You said that this could possibly—there could possibly been an injury from a rock?

A That's right.

Q It could have been from a—let's say I'm not a mechanic. Could it have been from some part of an automobile, couldn't it?

A That is possible.

Q Could it have been from a, I think they [170] call those things something that goes to the wheel there, a radial or something that is connected with the wheel on an automobile, couldn't it?

A I don't know specifically the type to which you refer.

Q Some kind of a pointed object?

A Alright.

Q It is possible?

A It is possible.

Q A rock would tend to make more of an indentation than a pointed depression, would it not? A rock say 8 inches in diameter?

A It would depend on the configuration of the rock.

Q Okay. So you're not saying anything in regard to other injuries which you may have discovered on the body of Bernard Crummett You don't have any idea where those injuries came from?

A Except for those of the shrapnel.

Q I'm talking about shrapnel didn't cause the death, did it?

A No.

Q And it didn't have anything to do with it?

[171] A No.

Q So, any other injury that you saw that wasn't compatible with being run over by an automobile or by a tire of an automobile? You don't have any idea how those got there, do you? Except they were caused by something outside?

A I can't say I don't have any idea, because examining the scene of the body I did notice—

Q You don't have Doctor—you don't have any professional opinion as to the type of force that was applied except there is some kind of a trauma with some type of an instrument being applied against the body or the body being applied against it? Isn't that the medical reasoning?

A Yes.

Q Thank you, Doctor. This body could have been thrown against something and those injuries caused by that, isn't that true?

A That is possible.

Q So what I'm saying, when you have an injury like you have described, you cannot with accuracy predict the exact instrument causing that injury or that trauma, can you? You can tell?

[172] A Yes, we can list probabilities.

Q Alright. Good. And in this area you would have to list a pointed object that could make a depression the size that you found, isn't that correct?

A Not any. I would remove, for instance, sharp instruments such as knives.

Q Right. We're not talking about a small puncture wound, are we?

A No.

* * * *

[174] Q And you have testified here to the cause of death?

A Yes.

Q That is just the way listed in your autopsy report as a crush injury to the brain. A crush injury to the brain?

A That's right.

Q Due to a comminuted skull fracture?

A Yes.

Q Due to a land craft vehicle?

A Right.

Q What is comminuted mean?

A Fragmented.

Q And what do you mean by cause of death as Bernard Crummett was run over? And his head was crushed by the tire of an automobile, is that correct?

A That's right.

Q And you know, do you not, that pictures that you have looked at here today and [175] have been introduced here today are shocking to the normal, average person?

A I would like to consider myself normal.

Q You are normal?

A I'm not shocked.

Q It is not—you're not shocked. Is that correct?

A No.

Q You have seen a thousand or two thousand of these pictures?

A Let's be more conservative, a thousand.

Q Your doctor's terminology, Doctor Halka, you used the word layman, do you not?

A I suppose so.

Q What does that mean to you? A layman?

A One who has not had medical training, restricted to medicine. I have a layman in regard to the legal profession.

Q But insofar as the medical profession, you mean someone not in the medical profession?

A That's right.

Q These pictures, Doctor, that you have shown us here, you would anticipate they would be shocking to the average layman, wouldn't you?

A It is possible.

* * * *

[183] Q Okay. Now, let's talk about these injuries that you say took place at the time Bernard Crummett was dead. Can you tell me again which injuries took place at the time he was already dead?

A Here is the best scene here relating to the trunk and the upper extremities.

Q Alright.

A The arm.

[184] Q The upper right arm and the right side of the body, is that correct?

A That's right. Close up of the same.

Q They all show the same thing?

A The same side, yes.

Q So those injuries you say, those wounds because of what were caused after death?

A It was an absence of blood at the latterated edge and depth of the wounds. This is confirmed by examination as well.

Q What did you say, lack of hemorrhaging?

A That's right.

Q That means not bleeding?

A That's right.

Q When does a person—how soon after a person is dead does a cut, say, stop bleeding and not bleed?

A It depends upon the retraction of the vessels, at what depth those vessels are located.

Q Well, how about a depth right below the epidermis? Right below the skin?

A They would stop rather quickly because they are small capillaries and they rear greater pressure.

Q What are you talking about, five minutes, ten minutes?

[185] A We are talking in time after death, immediately.

Q Immediately after death?

A Yes. Coincident with death.

Q Yes. Coincident with death. So, if someone were to die and one millisecond after he died, he were to be cut, there would be no blood there. Is that correct?

A I would find it difficult to define a millisecond. That is not my common experience.

Q Well, put it in your terminology then.

A Within seconds.

Q Within seconds?

A Yes.

* * * *

[192] Q Let's see, Doctor Halka, you go back over this one more time and and maybe we can go a little slower and see what really the picture now on Bernard Crummett is. Those injuries that he received when the ribs were broken caused some internal injury?

A By fracture. That fact of fracture is the injury I am speaking of.

Q Did they cause internal injuries other than the fractures? In other words, injuries to any other internal organ?

A No.

Q When a person has a fracture of the rib, does he bleed from that?

A Yes.

Q Okay. Internal bleeding?

A That is internal into the muscles or into the cavity depending if it is an open fracture or not.

Q And the average person, or well let's say, in Bernard here, how deep from his skin, [193] how far in do you have to go before you get to the ribs?

A A matter of half inch, perhaps, or an inch.

Q How about centimeters? Is that—

A One to two centimeters.

Q Two centimeters is an inch?

A Two and a half is an inch.

Q Okay. Okay, now, let's go back over it again. What were you talking about, the venous something?

A The venous circulation.

Q Venous circulation, what is that?

A That is the return flow of blood from the porphyry to the center from the exterior to the core.

Q In a person's body that means from the exterior parts of the body to the heart?

A Yes.

Q That is venous circulation?

A Yes.

Q What is the other?

A Arterial.

Q That means going out?

A From the heart to the extremities.

Q Venous is coming back?

[194] A Right.

Q Now, when a person sustains an injury, let's say a wound, an open wound that is bleeding, does the blood flow out of that wound normally?

A Yes.

Q And where there is a massive injury, a big injury as Bernard sustained by being run over by a tire, is there a lot of blood that comes out there?

A Yes.

Q Okay, now. Where does that blood come from?

A That blood comes from the major vessels which supply the brain, the scalp, and the skull.

Q Does it—alright, once a person dies and as you stated Bernard died from being run over with the car, what happens to a person's blood, say a person's blood in his legs. What happens to that blood?

A If the wound is sustained in the leg?

Q No. Let's say in his skull? What happens? The blood in the leg goes to the skull?

A No.

Q Okay. We're talking about—

[195] A So, that blood in his leg would be the external or the exterior. It would return in the process of dying to the core, to the heart core.

Q And go from the heart where?

A To wherever the hole is. In this case we're talking about several vessels in the skull.

Q And the heart keeps pumping?

A Yes.

Q After death?

A No.

Q No?

A No.

Q We—

A For practical purposes we define death at the time the heart stops pumping with circulation and the reason for this is the return of blood is an attempt to compensate the loss of blood which is no longer contained in the system, in the arterial or venous system. And as long as this compensation cannot provide sufficient blood for the heart to pump, the heart will pump.

Q Okay, now. In Bernard you figured that this heart pumping kept up for twenty-five or [196] thirty seconds?

A That is fair.

Q Twenty-five to thirty seconds? Now then, if only after the heart stops pumping that a person may be cut, and that no blood or oozing occurs—

A Right.

Q Is that fair?

A That's right.

Q So these wounds that Bernard had received to his side of his abdomen and to his arm and to his ribs, I guess.

A Right.

Q All of those, you're saying, occurred after the time the heart stopped beating?

A Right.

Q Okay. I think I'm still with you so far. Now, then, is there—so in Bernard these wounds could have happened anytime between thirty seconds after he died and what? What is the outer limit?

A These wounds could have occurred within thirty seconds outer limits. There is none—there would be some evidence you talking about the minimum, the outer limits is not applicable as I see it.

[197] Q That is where you lost me. You examined Bernard at about 7:00 in the morning?

A Right.

Q So you know that these wounds happened some time before seven in the morning?

A Right.

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[205] REDIRECT EXAMINATION BY MR. HOWARD:

• • • •

[207] Q Just a few questions, Doctor, the thirty second period of time pertaining—talking about that is on the exhibit or on the board that Mr. Bolding put on. Is that the period of time it takes for the heart, or it would have taken in Bernie's case, the approximate period of time for the heart to pump the blood out of the injury?

A That would be a minimum.

Q A minimum, that is what I mean.

A That is based on the fact that venous circulation in an adult male for his build would be approximately twenty seconds, if the heart were faster than fifteen if slower than twenty-five. So, we are giving a slight edge there

and agreeing to about thirty seconds. It's been determined in their normal and standard for that figure.

Q That would be, then, approximate minimum period of time it would take for the heart to pump the blood out on the pavement, so to speak, from the injuries?

A Yes.

Q We're talking about—

A Right.

Q And then, after that period of time [208] the injury would appear if it were sustained after thirty seconds, would appear as much as they do in the photographs?

A That's right.

Q So, you mean Doctor, that there is an approximate minimum of thirty seconds between the—or in your opinion, between the time the head injuries were sustained and the time that the injuries to the lower body, which show very little bleeding was sustained?

A That's right.

Q That is not the period of time between the time the heart stopped, if we defined Bernie died in terms of the time his heart stopped and injuries were sustained?

A As a minimum, you are depending on the action of the heart to keep the circulation sufficient so that there would be some oozing from small or large vessels.

Q We are talking about the seconds between the time the head injuries were sustained and the other injuries?

A Yes.

Q I'm not sure that we showed the jury when we started talking about this what we're talking about. The evidence is there was little [209] bleeding or oozing from those wounds whichever photograph best illustrates that. Could you show the jury what you see there which indicates to you that there was little bleeding. And therefore, the injuries were sustained at least thirty seconds apart.

A These two photographs show both the injury to the trunk that I spoke of, and those to the head. And this

photograph, also, you will notice, that there was a white plastic bag surrounding the head and it shows blood stains. There was blood in the hair, on the skin, and in the close-up you can see that these wounds show blood contained within the skin. And there are all about the head and neck area extending in a linear kind of direction up into the—well, we'll see only here the right side.

Q And it is the color of these wounds, at least in part, that distinguishes then one from the other. Is that correct?

A That's right. And the fact that there is still fluid blood in here.

Q Doctor, then assuming that the same automobile caused all these injuries—would it not be true that that—

MR. BOLDING: I object to that. There [210] isn't any proof of that unless he is going to prove—

THE COURT: Objection overruled. He is assuming, he is asking him to assume that.

MR. BOLDING: I thought, only hypothetical that he must be prepared to prove that.

THE COURT: The objection is overruled.

Q Assuming that the same automobile or even the same tire caused all of these injuries, then it would have to have been over a thirty second period of time. That the injuries were being sustained?

A That's right.

Q A minimum?

A At the minimum.

Q Does that fact, Doctor, play a part in your conclusion that Bernie was probably run over more than one time?

A Yes.

MR. HOWARD: No further questions, Your Honor.

RECROSS EXAMINATION BY MR. BOLDING:

Q Doctor, I'm sorry. I'm going to have to go over one more time. I think I misunderstood [211] Mr. Howard. The wound to the head caused the death?

A That's right.

Q The wound to the neck was sustained probably at the same time, wasn't it?

A That's right.

Q Alright. So all of those were sustained at one time, I mean probably?

A Yes.

Q Now then, those wounds happened at one time?

A Yes.

Q The wound to the arm, the abdomen, and the rib occurred after that time?

A Right.

Q At least thirty seconds after that time?

A That's right.

Q So they did not happen, in all probability, they did not happen within thirty seconds of each other?

A That's right.

Q Okay. And they happened anywhere, I'm talking about the wound to the abdomen and the arm and the ribs, they happened anywhere from thirty seconds after the injury to the head? [212] Anywhere from thirty seconds after the injury to the head up to the time that you examined the body, sometime in there?

A Alright.

Q Is that right?

A That's right.

Q They did not happen between the time of the injury and the time thirty seconds later?

A That's right.

* * * *

[EXCERPT OF TRIAL TESTIMONY OF FAITH ERWIN, TRANSCRIPT DATED JANUARY 15, 1974, VOL. II]

[TRANSCRIPT PAGES 429-512]

* * * *

FAITH ERWIN

A witness called by the State, being first duly sworn testified as follows:

* * * *

Q That what occurred?

A Then after they came out of the bedroom, Becky and that man were still on the couch. I was standing up with Willy, and Willy whispered we were going to rob him, but don't say anything. He left.

Q Then what happened?

A We left.

Q In what car did you leave?

A The white station wagon.

Q And who left?

A Becky and me and Willy and that man.

Q Where did you go?

A Over by "A" Mountain.

Q Had you been over in that area before?

A Not that I recall, I can't remember.

Q Had you been in the "A" Mountain area before?

A Yes.

Q With whom?

A By myself, you know, before this occurred.

Q About what time was it when you went to that area?

A About—it was after twelve, late.

Q Any discussion in the car on the way out there to that area?

A No.

Q You don't remember what was said?

A Nothing. We—really or anything, I can't recall what was said.

Q Can you describe the area where you went to where the car finally stopped?

A It was all desert.

Q Who drove the car to that location?

A Willy.

Q Did the car finally stop then, in a particular place that you can describe by the desert?

A Yes. Willy stopped the car and Willy said we had a flat. And the man got out, and I got out, and—

Q You say, "the man", do you mean the fellow who looked like the picture that I showed you?

A Yes. When the man got out, Willy got out and hit him over the head. You know, hit him with his fist and knocked him out.

Q Where were you seated when this happened?

A The passenger side in the front seat.

Q Where did this occur? What relation—which side of the car?

A The driver's side.

Q Did you actually see Willy Richmond hit this man?

A Yes.

Q Then what happened?

A Then I got out because I couldn't get out from the driver's side. That man was right there by the second door. I got out on the other side.

Q You got out on the passenger side of the vehicle?

A Yes. And I was standing around, and I went back around. That is when he was hit with the rock and was hitting that man.

Q Where was he getting the rocks from?

A The man—here is the car. It was right here. And the man was on the second door and Willy had to walk around like this to the desert side to get the rocks.

Q The man and Willy were both on the driver's side of the vehicle?

A Yes.

• • • •

Q And you got out on the other side of the door?

A Yes.

Q Now, where did you see Willy go to get these rocks?

A Around the car. He had to go around to that desert part.

Q To the same side of the car that you were on?

A Yes.

Q Further than where you were?

A I was just right there by the car, and about the same.

Q Okay. You actually saw him pick up the rocks?

A Yes.

Q Then what did he do?

A He came back around and, honest, the man—then I got sick. And I went around—

Q I asked you, can you describe what he did?

A He was throwing them like that.

Q Where was he standing?

A Right by the man.

Q Right beside the man?

A The man was laying there and he was right there.

Q And he was throwing them?

A Yes.

Q How large were these rocks?

A About like this.

MR. BOLDING: We would ask that the record indicate some size of the rocks, Your Honor.

Q About how large were the rocks?

A About like this. Just pretty big.

Q Approximately six or eight inches across. Is that what you are indicating?

A Maybe—they were big. I don't—they weren't small, they were pretty large.

Q Then what occurred?

A And then, you know, he hit him. And I was getting sick. And the next thing I know Becky was saying, "This is no time for getting sick."

Q Why were you getting sick?

A Because I was high enough to come down off of heroin.

Q Then what happened?

A Well, they all got in the car, and Becky was getting the wallet and what else, you know. I looked over to see what else was taken. And Becky was getting the wallet and we came in the car and left.

Q And where did you go from there?

A Back to the Sands Motel.

Q Did you run over anything?

A Yes, a man. It was a bump, after we were leaving.

Q After you felt that bump, was anything said in the car when you felt that bump?

A Becky said, it felt like a man's body.

Q Who was driving the car?

A Willy.

Q After you felt that bump, did you just keep going the same direction?

A Yes. I was laying back. I didn't feel him turn around or—

Q You don't remember whether the car turned around or anything?

A No.

Q Did you see Becky picking up any rocks?

A No.

Q Did you see Becky hitting the man?

A No.

Q At any time during this period of time, did Becky drive the car?

A No.

* * * *

Q How much heroin had you shot that day?

A I don't remember.

Q Were you high from heroin?

A Yes.

Q Okay. So the first person that you talked to then after you went to juvenile down here in Tucson, the first person that you talked to about whatever happened on the night of August 26 was who?

A You mean after I got picked up?

Q Yes.

A My lawyer.

Q Was that this man over here?

A Yes.

* * * *

Q Alright. So it was your understanding that, Faith, and correct me if I'm wrong, that you would not be charged with any crime?

A Yes.

Q And that you would not be sent back to Phoenix?

A Yes.

Q And that you would be placed in a foster home?

A Yes.

Q You would not be locked up?

A Yes.

Q If you would testify in this case?

A Yes. But Arizona—I don't know. Arizona told my lawyer something about that. I couldn't be just that free.

Q But you would be in a foster home?

A Pretty soon.

Q You wouldn't be locked up with a fence around it, right?

A I would be locked up. It wouldn't be for long.

Q I mean pretty soon you would get over to a foster home and wouldn't be locked up, is that right?

A Yes.

Q That was your understanding if you testified here today? All of that would happen?

A Yes.

Q So you agreed?

A Yes.

Q Have you signed an agreement with this prosecutor and with this man over here, that if you would testify here that you would get finally set into a foster home and not be locked and not be charged with any crime?

A Yes.

* * * *

Q You had Cotton Fever and still had the high temperature?

A Yes.

Q That is when you laid back and put your head back on the back and shut your eyes?

A Yes.

Q Alright. So there's no way, then, is there, Faith, for you to really know who got in the driver's seat?

A I saw Willy get in the driver's seat before I leaned back. Becky got in the back what is—that is when she talked about how much money they got.

Q Isn't it true Willy scooted over by you, and you were in the passenger side; and Becky got in and they took off, and Becky couldn't drive the car very well, and Willy stopped her after about a block and said, "Let me drive this thing." And he got over and drove?

A That is not true.

Q You were lying there with your—

A Becky was in the back.

Q Becky was in the back? You're positive of that?

A I am positive of it.

Q You were positive that Becky was in back?

A I am positive. I know Willy was driving.

Q Where was Becky?

A I am not sure. She was in the back or the front. But I knew Willy was driving the car because I leaned over that way.

Q At least he was driving when you got to the motel, wasn't he?

A Yes.

* * * *

Q Then, let's talk about where this, whose automobile this was?

A The white station wagon?

Q Yes, let's talk about this.

A Well, now, I know it was Ernest's from the last trial.

Q Okay. From the time when we were over in the Justice of the Peace Court, you know it was Ernest's?

A I didn't know then. I thought it was Becky's.

Q What made you think it was Becky's?

A She was the one that had it.

Q As long as you knew Becky she had that car, didn't she?

A Yes.

Q Okay. And she drove that car, didn't she?

A I can't remember if it was her or Sheila driving it. It went out the next night.

Q I am talking about any time?

A I don't recall.

Q Sorry.

A I can't remember if she was driving or not, because she can't drive very well.

Q But she can drive it can't she?

A She told me she couldn't drive.

Q You have been in the car with her when she was driving, haven't you?

A Not that I recall. I can't remember.

Q Not that you recall. Okay.

Now, had you ever told anybody that Becky had driven this car?

A I said the last time I was in Court—

Q Oh, you did?

A Yes.

Q How many times did you say it the last time you were in court?

A Once.

Q Just once?

A That I remember. I was going—I just remember once.

Q You didn't say it was more than once. You didn't say that more than once, did you?

A I don't recall.

Q Alright. And so that if Becky had driven the car back on that date, and now you say you don't remember

whether she drove the car. Which time do you think would be correct?

A What do you mean?

Q Well, you remember saying back on September 17, you remember saying that Becky drove the car?

A Yes.

Q Okay. And now you are saying you don't remember whether she drove it?

A I can't remember if it was hers.

THE COURT: I'm afraid that your questions might be confusing, when you say that she remembered that Becky drove the car.

MR. BOLDING: Okay. I'll try to clear that up, Your Honor.

Q Back on September 17 you answered questions and you said that you had been in that car, that white car with Becky. With just Becky and you, and with Becky driving, didn't you?

A Yes.

Q Yes?

A I said that at the last court.

Q That was in response to a question from the prosecutor, wasn't it?

A I don't remember who it was from.

Q And now you are saying to us that you don't remember whether Becky drove it?

A I can't remember if it was her or Sheila. Seems like I remember that Becky said she can't drive.

Q Let's see, have you talked with the prosecutor between September 17 and now?

A Yes.

Q Did you talk to him about whether Becky could drive or not?

A I don't remember.

Q You talked in his office yesterday with him, didn't you?

A Yes.

Q About whether—

A We just went over the transcript on it. I told him that I was remembering that Becky couldn't drive.

Q He talked with you about Becky could drive, or—

A I just told him that—

Q That just happened to come up?

A When I was reading over the transcript.

Q So what you are trying to tell us is the truth? That is the truth is that you don't think that Becky could drive?

A Right.

Q Okay. Now then, I will ask you if you remember these questions and these answers that were given back on September 17, page 25 line 15. And the question by Mr. Howard—

MR. HOWARD: I object, Your Honor. I don't believe this is inconsistent with what she said on the stand. It is a warning. A question was asked and she said, "yes." She said that on prior occasion, and that precludes the defense from reading it again.

THE COURT: I will allow him to read it again.

Q (by Mr. Bolding) Alright, do you remember this question and this answer? Question—by Mr. Howard, line 12, "Who did that car actually belong to, do you know?" Answer—"No." Question (By Mr. Howard) "Is this a car you had seen Becky driving before?" Answer—"Yes." Question—"On many occasions?" Answer—"No." You remember giving those questions and answers?

A Yes.

Q And then on page 42, line 12—

MR. HOWARD: I object, Your Honor.

THE COURT: Overruled.

Q The question by me. See if you remember these questions and these answers. Question—"Alright, as a matter of fact, you had been in that car with Becky by herself, just Becky and you, haven't you?" Answer—"Yes." Question—"With Becky driving?" Answer—"Yes." You remember those answers?

A Yes.

• • • •

Q You never told Regina Becky was driving the car the night this thing happened?

A No.

Q Okay. You just heard that night that Bernard Crummett was run over, you just heard one bump, didn't you?

MR. BOLDING: I don't have any other questions at this time.

• • • •

Q And, as a matter of fact, you knew back at the time of the preliminary hearing and right now you knew that if you got up there and testified, in other words, before you ever got up there you knew that once you got up there and testified that you would be given immunity against all charges?

A Yes.

Q And you knew that if you did not get up there and testify that you probably would be charged with robbery and murder, right?

A Yes.

Q Okay. You say you lied before, right?

A Yes.

Q You lied to get out of trouble before, haven't you?

A Not—yes.

Q You have gotten out of some trouble by lying before?

A Yes.

Q But you're telling us the truth now?

A Yes.

MR. BOLDING: Your Honor, we would offer this stipulation and agreement "G" in evidence at this time.

MR. HOWARD: No objection.

THE COURT: "G" may be admitted.

MR. BOLDING: I would like to have the opportunity to read to the jury, if I may?

THE COURT: You might.

MR. BOLDING: "Stipulation and agreement.

The State of Arizona, by and through, Dennis De Concini, Pima County Attorney and James M. Howard, his deputy, and Faith Erwin, represented by Richard J.

Michella entered into the following stipulation and agreement.

Number One—That Faith Erwin does hereby promise and agree to relate the true facts surrounding the death of Bernard Crummett on or about the 26th of August 1973 to law enforcement officers, and to testify to these facts at the preliminary hearing in this matter now scheduled for the 17th of September 1973. And in all judicial proceedings following that hearing in which her testimony is requested.

Number 2—That in regard—in return for her oral statement and testimony as aforesaid the State of Arizona promises and agrees that Faith Erwin will not be prosecuted for any crime save homicide committed by her prior to today's date. That she will not be prosecuted for her acts in connection with the death of Bernard Crummett. That she will remain in the custody of the State Department of Corrections at a prearranged place until this action against Willy Lee Richmond is terminated and that any and all matters now pending in juvenile court will be dismissed with prejudice.

Dated the 13th day of September 1973. Signed by James M. Howard, Deputy County Attorney.

Faith Erwin.

Richard J. Michella, Attorney for Faith Erwin."

So right now you have gotten out of trouble you were in?

A Yes.

• • • •

[EXCERPT OF TAPED CONFESSION OF DEFENDANT RICHMOND INTRODUCED AT TRIAL, TRANSCRIPT DATED JANUARY 15, 1974, VOL. II]

[TRANSCRIPT PAGES 538-545]

* * * *

Q The following being the taped statement taken at the Pima County Holding area, in the County Administration Building on 9-11-73 at approximately 10-27 hours. Present during this taping is Willy Lee Richmond, Sargant Larry Bunting, Tucson Police Department and Detective Mike Tucker, Pima County Sheriff Office.

This tape is being taken in reference to the death of Bernard T. Crummett, which occurred on the 26th day of August of 1973.

A COPY OF THE TAPE.

"Q Would you please state your full name.

A Willy Lee Richmond.

Q Please state your date of birth and where you were born?

A March 2, 1948, Lambert, Mississippi.

Q Mr. Richmond, being that you are in custody, I have to advise you of your Miranda Rights. You have the right to remain silent. Anything you say can and will be used against you in a Court of law. You have the right to the presence of an attorney to assist you prior to questioning, and to be with you if you so desire. If you cannot afford an attorney, you have the right to have an attorney appointed for you prior to questioning. Do you understand these rights?

A Yes, I do.

Q Now, having been advised of these rights, and understanding these rights will you answer my questions?

A Yes.

Q Would you please relate to me in your own words, what occurred on about the 25th or 26th of August 1973 in reference to a death on west 22nd Street behind "A" Mountain?

A Okay, me and Faith, my old lady, was at the Bird Cage and we was sitting outside in the car. You know, we smoked pot too. You know. So we were sitting in the car, and we were sitting in Becky's car because me and Faith stayed over at Becky's apartment, you know, over night. And it was a couple of days, I think it was a couple of days because I was driving the car, the station wagon. You know, I took it.

She came out with this dude, a trick, okay. We goes to the apartment with her, to her apartment at the Desert Sands and we have a big argument. You know, about her, and she tried to get my woman to turn a trick. And I don't want her to turn no trick. And dude want to pay my woman, my girl friend $40, you know, for a trick. And I told him no way. So we get to arguing in the car, you know. So she gets pissed off, you know. So I told her fuck it, just take me and Faith and drop us off and she said no. I take it back, you know, I apologize and she took me out the car and went bla bla this and that. You know. So she, the trick got money, you know. So okay. Where are you going to? Well, we are going to take him to the apartment.

So we went to the apartment. Okay. When you get to a short change, you know, like a prostitute or get like—you give the chick $20 and she could come to her man and give her man $20 and he goes to his pocket and he has two tens, you know, in his pocket. And he comes up with it. You dig? Alright. Well, this was going to cost some dough, which I had the dough.

This was in front, him finding the dough. I didn't know what he was. Okay. So I does it on her to game. So I say, wait a minute Mama this ain't nothing but a tin. I'm palmy with twenty, and I've got the other ten in my hand, and said, Oh, this is all I got, you know. You didn't give me but a ten.

So she goes back to the dude and makes the dude give her twenty more dollars. And at that time he shows her

his wallet. You know. And she comes back. The bitch must have been stupid or something. I don't know, man. But anyway, she said he's loaded. He's got bread.

So I said we can't rip him off here in the apartment, because he will remember the apartment. You know. So she said—

THE COURT: There is a certain portion in here that I have ruled is not admissible, and we are trying to skip that particular portion.

(Whereupon at this time the portion was omitted and not heard by the jury.)—like you say out there at 22nd. Drove up there, turned around and I stopped the car. He was on the side, I was in the back, and Faith and her were in the front seat with me. So I get out and she gets out.

I opened the door. I snatched the dude out by his colloar, and bam, he falls straight out. I wanted to go through his pockets, but she was already going through his pockets and he was getting up and I reached down and punched him again. So my old lady, Faith, she couldn't take it. She got out of the car and she looked and she started crying, you know. And about that time I am looking at her, and going through his change. And this rock, you know, like that, and dip, dip like that, you know. And I said, wow, to myself, you know. Come on let's get in the car and me and her get in the car, and I am talking to her and Rebecca gets in the car and she backed up and she throws up in gear and comes back over. And we were going on down further and she was all over the fucking road, and said give me this mother fucking car and let me drive, you know.

And so I went on and we went back to see what we did do. We went back to her apartment, and split the money. And she didn't want to give my old lady no money. So I did. So she said well, you give it to her. And so, you know, so I gave my old lady some bread because she was feeling down and we were copped and we fixed up again.

Q Whose car was used in this?

A Ernest Jones.

Q Could you describe the car to me?

A It's a white '59 Chevy or '69 or something. It's white, got a dent on the—a dent on the left side.

* * * *

Q Did you know who this guy was? What his name was?

A I didn't even know nothing about him. He was just a trick she pulled.

Q Did she, Becky, you refer to this person Becky, do you know her full name?

A Becky, Rebecca, Rebecca Corrella.

Q Rebecca Corrella? Did she ask you and Faith to go with her from the Bird Cage, is that right?

A She wanted my woman to turn a trick and I told her no. And she got mad. She tell me all you want me to turn tricks is and shit and you let this white bitch lay up and not do nothing.

And I tell her, well, she is just not that type of a person, you know.

Q Were you carrying a gun that night?

A She had it. She had it in her purse.

Q What kind of a gun was it?

A A 22.

* * * *

[EXCERPT OF TESTIMONY OF CHARLES PALMER, TRANSCRIPT DATED JANUARY 15, 1974, VOL. II]

[TRANSCRIPT PAGES 561-566]

* * * *

CHARLES PALMER,

a witness called by the defendant, being first duly sworn testified as follows:

DIRECT EXAMINATION BY MR. BOLDING:

Q Will you state your name, please, sir?

A Charles Palmer.

Q Let me just introduce myself. I am Ed Bolding, and I called you on the telephone, do you remember receiving the phone call?

A Yes.

Q Alright, Mr. Palmer. What is your occupation, sir?

A Right now, I am a service station attendant.

Q Back in August and September of 1973 what was your occupation, sir?

A Security guard for Texton.

Q What is Texton?

A A building contractor for Park Place and various other areas around town.

Q Alright. Where—let's talk specifically about August 25 and August 26 of 1973. Where were you working specifically?

A Park Place. Which is off 22nd on the west side of town.

Q And Okay. Was it Park Place?

A It is a housing development about 300 and 80 homes being built.

Q And your job was to be security man?

A Security guard, yes.

Q At night?

A Yes.

* * * *

Q Now, on the morning of August 26, 1973, Mr. Palmer, did you see any automobiles driving down here to the west end of 22nd?

A Well, as far as going clear to the end of west end of 22nd Street, I couldn't say that they went over the berm or anything like that. But they went past my area and there was no place for them to turn off rather than go to the end.

Q Alright, sir. Your Park Place area where you were guarding that night, there is a turnoff of 22nd, is that correct?

A Yes.

Q That is the last turnoff before an automobile would get to the dead end of 22nd?

A Of any residence or anything like that.

Q Okay. Alright. On the morning of August 26, 1973 did you see an automobile driving down toward the dead end or the very end of west 22nd?

A Yes.

Q Do you have field glasses that you use?

A Yes.

Q Or you had been at that time?

A I had been at that time.

Q And how many automobiles, let's say on the morning between midnight of the morning of August 26 and 6:30 the time you went off—or well—alright let's go back and reconstruct a little more. At about 5:20 that morning did you see any Sheriff's vehicles or any activity?

A Yes.

Q Now, between midnight and 5:20 when you say that you saw Sheriff's Vehicles, how many cars did you see go down toward the west end or the dead end of west 22nd?

A Well, between six and eight, I don't exactly know how many, but it was between six and eight.

Q Alright. The last car that you saw and you may need to refresh your memory from this statement, do you remember about what time the last car was that went down there before the Sheriff's vehicle arrived?

A I would say it was about four.

Q You saw that vehicle go toward the end of the paved portion?

A Yes.

Q And stayed there about how long?

A I don't think it stayed there very long. It just turned around and it came right back out.

* * * *

[EXCERPT OF TRIAL TRANSCRIPT OF COURT'S INSTRUCTIONS TO THE JURY]

[TRANSCRIPT PAGES 659-660]

* * * *

The unlawful killing of a human being whether intentional, unintentional, or accidental which occurs as a result of the perpetration of or attempt to perpetrate the crime of robbery and where there was in the mind of the perpetrator a specific intent to commit such crime is murder of the first degree.

The specific intent to perpetrate robbery and the perpetration or attempt to perpetrate such crime must be proved beyond a reasonable doubt.

If a human being is killed by anyone of several persons engaged in the perpetration of or attempt to perpetrate the crime of robbery, all persons who either directly or actively commit the act constituting such crime or who knowingly and with a criminal intent aid and abet in its commission, or whether present or not who advise or encourage its commission are guilty of murder in the first degree, whether the killing is intentional, unintentional, or accidental.

* * * *

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

(Caption Omitted in Printing)

VERDICT

We, the Jury, duly impaneled and sworn in the above entitled action, upon our oaths, do find the Defendant, WILLIE LEE RICHMOND, GUILTY of the crime of FIRST DEGREE MURDER under Count I of the Information.

/s/ Walter E. Cally
Foreman

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

(Caption Omitted in Printing)

MINUTE ENTRY

Date Feb. 27, 1974

SENTENCING:

Defendent present. James Dickerson reporting.

This being the time set for sentencing, and no legal cause having been shown why sentence should not be passed at this time; and

The Defendant having been found GUILTY by a Jury of Count II of the Information which charges ROBBERY;

IT IS THE JUDGMENT OF THE COURT that the Defendant is GUILTY as charged.

IT IS THE JUDGMENT AND SENTENCE OF THE COURT that the Defendant be incarcerated in the Arizona State Prison for a period of not less than fifteen (15) nor more than twenty (20) years.

As to Count I,—Pursuant to Section 13-454, Subsection (c), the Court returns the following special Verdict as to findings of existence or nonexistence of circumstances set forth in Subsections (e) and (f):

As to Subsection (e): Aggravating Circumstances to be Considered:

As to Item 1:—THE COURT FINDS nonexistence of that item.

As to Item 2:—THE COURT FINDS the Defendant was previously convicted of a felony in the United States

involving use or threat of violence on another in A-17969 in the Superior Court of Pima County.

As to Items 3, 4 and 5:—THE COURT FINDS nonexistence of those items.

As to Item 6:—THE COURT FINDS that the Defendant did commit the offense in an especially heinous and cruel manner.

As to Subsection (f): Mitigating Circumstances

As to Item 1:—THE COURT FINDS that the Defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law was not significantly impaired.

As to Item 2:—THE COURT FINDS that the Defendant was not under unusual or substantial duress.

As to Items 3 and 4:—THE COURT FINDS nonexistence of those items.

Therefore, the Jury having returned a Verdict of GUILTY to the crime of FIRST DEGREE MURDER:

IT IS THE JUDGMENT OF THE COURT that the Defendant is GUILTY as charged.

IT IS THE FURTHER JUDGMENT OF THE COURT that the Defendant be sentenced to DEATH.

IT IS ORDERED that the Clerk shall file a notice of appeal as provided by the Rules of Criminal Procedure, 26.15.

IT IS ORDERED that the Defendant remain in the custody of the Sheriff for transportation to the Arizona State Prison.

Deft. is advised of his appeal rights.

IT IS ORDERED that the Public Defender be appointed to represent the Defendant on appeal to the Arizona Supreme Court.

/s/ Richard N. Roylston
Judge

MARY DEGAGNE
Deputy Clerk

cc: County Attorney
Sheriff
Public Defender, Ed Bolding
Court Administrator
Arizona State Prison
Adult Program

SUPREME COURT OF ARIZONA
IN BANC

No. 2914

STATE OF ARIZONA,
Appellee,

v.

WILLIE LEE RICHMOND,
Appellant.

Dec. 20, 1976

HOLOHAN, Justice.

Willie Lee Richmond was tried and convicted of the first-degree murder of Bernard Crummett in Pima County, Arizona. A sentencing hearing was held, and the defendant was sentenced to death.

Evidence introduced at trial showed that on the evening of August 25, 1973, the victim went into the Birdcage bar in Tucson and met Becky Corella, a dancer working there. Later that evening, Becky and Crummett went out to the parking lot to persuade the defendant to allow his 15-year-old girlfriend, Faith Erwin, to prostitute herself with Crummett. When both the defendant and Faith refused, a conversation ensued and eventually Becky decided to prostitute herself with Crummett. All four persons drove in Becky's borrowed station wagon to her motel apartment on the Benson highway.

When Becky and Crummett returned from the bedroom, the defendant whispered to Faith that the three of them were going to rob the victim, but not in the apartment because Crummett would remember the location.

In the company of his two accomplices, the defendant drove the victim to a remote area outside Tucson and stopped the vehicle, saying the station wagon had a flat tire. When the victim got out of the car, the defendant beat him with his fists and rocks rendering the victim unconscious. Thereafter Becky and the defendant went through the victim's pockets taking his watch and wallet. In leaving the scene the vehicle was twice driven over Crummett who was still lying unconscious on the ground. The victim died from his injuries.

Although granted immunity, Becky Corella was not called upon to testify by either side. At trial, the crucial evidence against the defendant was the testimony of Faith Erwin and the defendant's own extrajudicial admissions. The defendant did not testify. The state's theory was that he perpetrated the homicide while engaged in robbery and thus committed first-degree murder. The primary defense theory was that because the robbery had terminated prior to the homicide the defendant could not be found guilty of first-degree murder under a felony-murder theory.

After the defendant was convicted, a sentencing hearing was held pursuant to A.R.S. § 13-454 to determine the sentence. The court rendered a special verdict finding the existence of two aggravating circumstances: 1) that the defendant was previously convicted of a felony involving the use or a threat of violence on other persons, and 2) that the defendant had committed the offense in an especially heinous and cruel manner. It found none of the statutory mitigating circumstances to be present. Based on its findings, the court sentenced the defendant to death. Subsequently, the defendant filed a Rule 32 petition claiming newly discovered evidence. The petition was denied. He appeals from the judgment and sentence and from the denial of his Rule 32 petition.

The defendant's appeal raises the following issues:

I. Did the trial court commit reversible error in submitting the case to the jury on a felony-murder theory?

II. Did the trial court err by admitting the defendant's extrajudicial statements into evidence?

III. Was the testimony of the defendant's accomplice corroborated?

IV. Did the trial court abuse its discretion by admitting the photographs of the corpse?

V. Did the trial court commit reversible error by refusing to grant the defendant's requests for mistrials which were based on the alleged inadmissibility of certain items accepted into evidence?

VI. Did the court commit reversible error in summarily denying the defendant a Rule 32 hearing in relief?

VII. Does the imposition and implementation of the death penalty constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States?

VIII. Is the imposition of the death penalty excessive in this instance?

I.

The defendant submitted proposed instructions directing the jury not to consider any felony-murder instructions if they found that the robbery had been completed prior to the death of the victim. He contends that it was reversible error for the trial court to deny these instructions and permit a conviction for murder in the first degree based on a felony-murder theory.

In a leading case, the Missouri Supreme Court stated that the felony-murder statute, "applies where the initial crime and the homicide were parts of one continuous transaction, and were closely connected in point of time, place and causal relation, as where the killing was done

in flight from the scene of the crime to prevent detection, or promote escape." *State v. Adams*, 339 Mo. 926, 98 S.W.2d 632 at 637 (1936). The majority of American jurisdictions have remained in accord with this rule. Annot. 58 A.L.R.3d 851 (1974).

Here, the evidence shows that the actions which caused the victim's death transpired during or immediately following the robbery as a part of the chain of events which the defendant's deliberate acts had set in motion. The defendant and his accomplices were fleeing from their crime when the vehicle was driven over the victim. The victim's death was a direct and proximate result of the robbery and so constitutes first-degree murder. *State v. Hitchcock*, 87 Ariz. 277, 350 P.2d 681 (1960), *cert. denied*, 365 U.S. 609, 81 S.Ct. 823, 5 L.Ed.2d 821. Furthermore, the escape was an essential part of the robbery.

Recently, we have said, "[W]hen the felony is so entwined with the murder that it is part of that murder we will not hold a stopwatch on the events or artificially break down the actions of the defendant into separate components in order to avoid the clear intent of the legislature in enacting the felony-murder rule." *State v. Richmond*, 112 Ariz. 228, 540 P.2d 700 (1975). Thus the facts in the instant case do not justify the instructions requested by the defendant and do support his conviction for felony-murder.

II.

The defendant contends that certain incriminating statements he made on September 11, 1973, while in custody were admitted at trial in violation of his Sixth Amendment right to counsel. At the time the statements were taken the defendant was already represented by the public defender on two unrelated murder charges. *See State v. Richmond*, *supra*, and *State v. Richmond*, 23 Ariz.App. 342, 533 P.2d 553 (1975). He had received a preliminary hearing and been bound over for trial on one

of the charges. Earlier that same day he had been arraigned on the other charge after the return of a grand jury indictment.

Two police officers came to "the holding tank" where the defendant had been returned after his arraignment, and served him with a warrant for his arrest on charges of robbing and murdering Bernard Crummett, the victim in this case. The officers read the defendant his *Miranda* rights and then recorded the statement he agreed to make.

They made no effort to contact the public defender before taking the statement; nor did they ask the defendant if he wished to summon the deputy public defender who was representing him on the other murder charges. Under similar circumstances, we have held that law enforcement officers are not under a constitutional duty to contact a lawyer for the accused if he makes a valid waiver of that right. *State v. Marks*, 113 Ariz. 71, 546 P.2d 807 (1976). *See also Biddy v. Diamond*, 516 F.2d 118 (5th Cir. 1975); *U.S. v. Zamora-Yescas*, 460 F.2d 1272 (9th Cir. 1972), *cert. denied*, 409 U.S. 881, 93 S.Ct. 210, 34 L.Ed.2d 136 (1972); *Coughlan v. U.S.* 391 F.2d 371 (9th Cir. 1968), *cert. denied sub. nom., Coghlan v. U.S.*, 393 U.S. 870, 89 S.Ct. 159, 21 L.Ed.2d 139 (1968).

The defendant also contends that his admissions were not preceded by a knowing, intelligent and voluntary waiver of his constitutional rights. The evidence taken at the voluntariness hearing controverts that contention. The defendant did not testify at the hearing nor did he introduce any evidence to support his allegation. Since the record of the hearing supports the conclusion of the trial court, the statements of the defendant were properly found to be voluntary. *State v. Durham*, 111 Ariz. 19, 523 P.2d 47 (1974); *State v. Hughes*, 104 Ariz. 535, 456 P.2d 393 (1969).

Along with his Sixth Amendment argument the defendant contends that his admissions must be suppressed because they were obtained in violation of EC 7-18 and

DR 7-104 of the Code of Professional Responsibility. These provisions forbid an attorney to converse with an opposing party outside the presence of that party's counsel. The defendant argues that the deputy county attorney violated the code when he used the defendant's statements which law enforcement officers had obtained by talking with the defendant outside the presence of his counsel.

The defendant does not allege, nor is there anything in the record which indicates, that the Pima County Attorney or staff were aware of that particular interrogation. Instead, he claims that as an indigent criminal defendant, dependent on publicly furnished counsel, he was denied a protection afforded to civil litigants with private counsel. We find no merit in that claim. The procedures for protecting the rights of criminal defendants have been outlined by the U. S. Supreme Court in such decisions as *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The cited portions of the Code of Professional Responsibility are generally assumed to be for the purpose of affording civil litigants some of the protection which the Constitution guarantees to criminal defendants. *State v. Nicholson*, 463 P.2d 633 (Wash.1969). As long as law enforcement officers comply with the requirements of the Constitution in the pursuit of their investigation, an incriminating statement which is freely and voluntarily given is admissible. The trial court found that the statement in question was freely and voluntarily given and that the police officers had complied with the requirements of *Miranda*. The record supports this finding, so it was not error to admit the statement.

III.

The defendant claims he was convicted solely on the basis of the uncorroborated testimony of an accomplice. No conviction shall be had on the testimony of an accomplice unless it is corroborated by other evidence which tends independently to link the defendant with the com-

mission of the offense. A.R.S. § 13-136.[1] The state argues that the witness, Faith Erwin, was not an accomplice. We have held that an aider or abettor in the commission of a crime is an accomplice. *State v. Rackley*, 106 Ariz. 424, 477 P.2d 255 (1970). In the instant case there was preconcert, in that Faith Erwin knew of the plan to rob Bernard Crummett before she accompanied him on his final automobile ride. *Cf. State v. Sims*, 99 Ariz. 302, 409 P.2d 17 (1965). While her participation was minor the fact that she joined in the venture establishes her as an accomplice.

The accomplice's testimony is amply corroborated. The results of the autopsy, the photographs of the victim's body at the scene of the crime, the discovery of a wallet similar to the victim's in the murder vehicle and the identification of the defendant as a frequent driver of that vehicle all tend to link the defendant with the offense. The most conclusive corroboration come from the defendant's own statement in which he admits striking and robbing the victim. Taken together, the evidence corroborating Faith Erwin's testimony is overwhelming.

In oral argument before us the state noted that the trial court failed to instruct the jury on the applicable principles of law concerning the necessity for corroboration of the testimony of an accomplice. In *State v. Howard*, 97 Ariz. 339, 400 P.2d 332 (1965), we held that the failure to give such an instruction when warranted, even though not requested by either side, is reversible error. In *State v. Brewer*, 110 Ariz. 12, 514 P.2d 1008 (1973), we modified that opinion.

> "[W]here the evidence of corroboration is overwhelming and the defendant does not request a corroboration of accomplice instruction, the giving of such an instruction on the courts' own motion is not mandated by our statute and the failure to give such an instruction should not be considered fundamental error." *State v. Brewer*, 110 Ariz. 12, 17, 514 P.2d 1008, 1013.

[1] This statute, in effect at the time of the defendant's trial, has since been repealed. Ch. 116, § 1, Session Laws 1976, 32d Leg., 2d Reg. Sess. (1976).

In light of the overwhelming evidence of corroboration in the instant case the failure to give a corroboration of accomplice instruction was not reversible error.

IV.

The defendant next claims that the trial court abused its discretion in admitting certain photographs of the victim's corpse because their prejudicial effect outweighed their probative value. At trial the defendant offered to stipulate to the identity of the victim and to his being run over by a vehicle as the cause of death. The state wanted to expand the stipulation to include the defendant striking the victim's head with a rock as a factor contributing to his demise. The defendant would not agree.

The discretion to admit or exclude gruesome photographs is vested in the trial court, and competent evidence will not be excluded simply because it may arouse emotions. *State v. Ferrari*, 112 Ariz. 324, 541 P.2d 921 (1975); *Young v. State*, 38 Ariz. 298, 299 P. 682 (1931). In addition to being relevant to the state's theory of the case, the exhibits corroborate Faith Erwin's testimony by pictorially representing some of the circumstances which she described, and some of the photographs were used by the pathologist to illustrate his testimony. Because their probative value had been established, the trial court did not err in admitting the photographs of the deceased.

V.

The defendant contends that the trial court committed reversible error by not granting his motions for mistrial when allegedly inadmissible and prejudicial evidence was introduced. He refers to three instances in the record to support his contention.

The first instance occurred during the voir dire examination of the prospective jurors. The prosecutor asked:

> "Q. Is there anyone on the panel who feels that the crimes or murder is any less serious when they occur when involved with narcotics addiction?"

No objection was lodged by the defendant at that time, and both the prosecutor and the defendant passed the jury panel. At the end of the case the defense did move for a mistrial because of the voir dire statement. Unless there has been a timely objection made at trial to a question asked during jury voir dire, we do not consider the matter on appeal. *Argetakis v. State*, 24 Ariz. 599, 212 P. 372 (1923); *Kinsey v. State*, 49 Ariz. 201, 65 P.2d 1141 (1937).

The second instance cited by the defense concerns the testimony of Faith Erwin on redirect examination by the prosecution. She testified that she had used heroin previously as well as on the day of the homicide. The defense objection to the prosecutor's question about who was present when she used heroin was sustained by the court. A motion for mistrial was denied. The defendant argues that the inference was left that he was present and somehow connected with this illegal activity.

The subject of Faith Erwin's heroin habit was introduced by the defense in cross-examination. The defense also brought out that for some two weeks before the homicide the witness had been using heroin every day. It further brought out that the witness was under the influence of heroin while she was with the defendant and Becky Corella on the day of the homicide. The trial judge's ruling in denying a mistrial was not an abuse of discretion because the matter had been developed by the defense on cross-examination. Any inference concerning drug use originated from testimony introduced by the defense.

The defense also urges that a mistrial should have been declared when the prosecution, on redirect examination,

asked Faith Erwin to whom she gave the money for an act of prostitution. She replied that it was to the defendant. The defense motion to strike was granted, but the motion for a mistrial was denied.

In addition to granting the defense motion to strike that testimony, the trial court instructed the jury to disregard both the question and answer. The defense argues that this was not sufficient to protect the defendant from the prejudice caused by the answer. To decide this issue we must examine the statement for its possible effect on the jury. *State v. Arroyo*, 99 Ariz. 68, 406 P.2d 734 (1965).

The total circumstances of the case disclose that the defendant was involved with persons connected with prostitution, and that the defendant used such association to carry out his scheme to rob the victim in this case. The defendant originally met the victim when he and Becky Corella approached the defendant and Faith Erwin to arrange an act of prostitution. The defendant took part in discussions which culminated in the defendant accompanying the others to the motel where Becky Corella performed an act of prostitution. Viewed in the light of circumstances shown by the admissible evidence, the action of the trial court in striking the questioned testimony and instructing the jury to disregard it was sufficient to overcome any prejudice to the defendant. The denial of a mistrial was not error.

The third instance complained of was the playing of the tape in which the defendant recounted his version of the circumstances surrounding the murder. In the course of his narration the defendant mentioned that he and Faith smoked marijuana while parked at the Birdcage awaiting Becky and that after dividing the proceeds of the robbery he and Faith "fixed up again." He also stated that Becky Corella was carrying a pistol on the night in question. The defendant argues that those isolated pieces of testimony painted him as a marijuana smoker, a dope addict

and a gun carrier, and that none of these facts is relevant to the crime charged.

Evidence of other crimes which the defendant may have committed is prejudicial and usually inadmissible. *State v. Tostado*, 111 Ariz. 98, 523 P.2d 795 (1974). One of the well-established exceptions to the general rule disallowing such evidence is the complete story exception.

> "[E]vidence of another offense, misconduct or prior bad acts is admissible to prove the complete story of the crime even though there is revealed other prejudicial facts, such as the defendant has committed other criminal offenses or misconduct." *State v. Collins*, 111 Ariz. 303, 305, 528 P.2d 829, 831 (1974).

See also State v. Villavicencio, 95 Ariz. 199, 388 P.2d 245 (1964); *State v. Evans*, 110 Ariz. 380, 519 P.2d 182 (1974).

The incidents described in the contested testimony are so blended with the commission of the instant offense that they explain the circumstances of the crime. *State v. Villavicencio, supra.* The defendant's description of the activities on the night of the crime provide evidence of his intent and plan. These clearly admissible items are so entwined with the other bad acts that it is virtually impossible to separate them. The defendant's explanation of the events which happened preceding and subsequent to the homicide were admissible in order that the full story could be understood. There was no error in the admission of the evidence.

VI.

The defendant contends that the trial court erred in summarily denying him a hearing on his Rule 32 post-conviction relief petition. The defendant appended to his petition affidavits from two witnesses who allegedly would testify that Becky Corella had told them that she, rather than the defendant, was driving the vehicle when it ran over Bernard Crummett. Based on his contention that the

robbery had been terminated before the victim was crushed by the vehicle, the defendant argues that these affidavits present newly discovered material facts which would have changed the verdict had they been introduced at trial. Such a ground is within the scope of Rule 32.1. He further argues that he was entitled to an evidentiary hearing pursuant to Rule 32.8, Arizona Rules of Criminal Procedure, 17 A.R.S. In the language of the comment to Rule 32.6:

> "If the court finds from the pleadings and record that all of the petitioner's claims are frivolous and that it would not be beneficial to continue the proceedings, it may dismiss the petition. . . . However, if the court finds any colorable claim, it is required by *Townsend v. Sain*, 83 S.Ct. 745, 372 U.S. 293, 9 L.Ed.2d 770 (1963) to make a full factual determination before deciding on its merits."

To be colorable, a claim has to have the appearance of validity, i.e., if the defendant's allegations are taken as true, would they change the verdict? We are satisfied that they would not. The newly discovered evidence must be such that it dies not merely bolster, impeach or contradict testimony offered at the trial. *State v. Morrow*, 111 Ariz. 268, 528 P.2d 612 (1974). The statements of the defendant's affiants merely contradict Faith Erwin's testimony that the defendant was driving.

Furthermore, we have rejected the defendant's theory that the escape was not a part of the robbery. *See* I, *supra.* Arizona law states that all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense or aid and abet in its commission, are principals in any crime so committed. A.R.S. § 13-139. The record demonstrates that the defendant instigated the robbery, battered the victim into unconsciousness and took his belongings. All who participate in the commission of a crime are equally guilty as principals. *State v. Collins, supra.* Even if we accept as true the de-

fendant's allegation in his Rule 32 petition, we must find him criminally liable for this murder regardless of whether he or his accomplice was driving the vehicle at the time in question.

VII.

The defendant challenges the constitutionality of the death penalty and Arizona's death penalty statute, A.R.S. § 13-454. The Federal Supreme Court has declared that the imposition of the death penalty for the crime of murder does not, under all circumstances, violate the Eighth and Fourteenth Amendments of the United States Constitution. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Nor does it violate the Arizona Constitution. We addressed this issue in *State v. Endreson*, 108 Ariz. 366, 498 P.2d 454 (1972) and in that pre-*Furman* case ruled as a matter of state constitutional law that the death penalty is not cruel and unusual punishment under Article 2, § 15 of the Arizona Constitution. *See also State v. Maloney*, 105 Ariz. 348, 464 P.2d 793 (1970); *State v. Malumphy*, 105 Ariz. 200, 461 P.2d 677 (1969); *State v. Jones*, 95 Ariz. 4, 385 P.2d 1019 (1963). We have found nothing to persuade us to depart from our rule in *Endreson* that the imposition of the death penalty does not violate the Arizona Constitution.

As part of his broad attack on Arizona's system, the defendant argues that prosecutorial discretion, plea bargaining, jury discretion to convict on a lesser-included offense and the possibility of sentence commutation or executive clemency are mechanisms of the arbitrary selectivity found unconstitutional in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). This point was raised in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976):

> "The existence of these discretionary stages is not determinative of the issues before us. . . . Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." 428 U.S. 199, 96 S.Ct. 2909, 2937, 49 L.Ed.2d 859, 889.

The defendant contends that standards to guide a sentencing body are impossible to formulate. The *Gregg* court held that a statute which gives the sentencing authority "adequate information and guidance" would meet the concerns expressed in *Furman*. *Gregg v. Georgia*, 428 U.S. 195, 96 S.Ct. 2909, 2935, 49 L.Ed.2d 859, 887 (1976). Arizona's system for the imposition of the death penalty, based on aggravating and mitigating circumstances, insures that the sentencing authority is given adequate information and guidance.

The defendant further contends that the legislative criteria are too vague and subjective to satisfy *Furman*. In *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), the United States Supreme Court was faced with similar challenges to a capital sentencing procedure which, in this context, is indistinguishable from the Arizona statute. *State v. Murphy*, 113 Ariz. 416, 555 P.2d 1110 (1976). That court stated:

> "The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones." *Proffitt v. Florida*, 428 U.S. 258, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913, 926 (1976).

We conclude that the Arizona statute satisfies the requirements of due process and equal protection.

The defendant argues that the statutory method for determining sentence after the special verdict has been returned is unconstitutionally ambiguous.[2] According to

[2] "D. In determining whether to impose a sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years, the court shall take into

the defendant's theory, because the subsection does not specifically limit the mitigating circumstances which could be considered by a trial court to those enumerated in subsection F, it allows the judge to consider any mitigating circumstances he chooses. The defendant also contrasts the language in subsection E, "aggravating circumstances to be considered shall be the following: . . ." with the language in subsection F, "mitigating circumstances shall be the following: . . ." We find his construction of the statute to be incorrect.

The purpose of A.R.S. § 13-454 is to confine the discretion of the sentencing authority within defined limits. We reject the defendant's construction and hold that subsection D authorizes the trial court to take into account only those mitigating circumstances enumerated in subsection F. For the same reason we find the argument that the statute allows the trial judge to impose the death sentence even if no aggravating circumstances are found to be an incorrect interpretation of A.R.S. § 13-454. *See State v. Murphy, supra.*

The defendant finally argues that it is unconstitutional to leave the determination of sentence to the judge. The Supreme Court rejected that argument in *Proffitt v. Florida, supra*, by declaring that it had never suggested that jury sentencing was constitutionally required.

When a death sentence is imposed appeal is automatic, 17 A.R.S. Rules of Criminal Procedure, Rule 31.2(b), and A.R.S. § 13-1711 vests jurisdiction in this court. Because of the unique severity of the penalty we will accord prompt consideration to appeals from an imposition of the death sentence.

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account the aggravating and mitigating circumstances enumerated in subsections E and F and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection E and that there are no mitigating circumstances sufficiently substantial to call for leniency." A.R.S. § 13-454.

The legislature charged this court with the duty to correct sentences which are illegal and sentences where we find that the punishment imposed is greater than the circumstances of the case warrant. A.R.S. § 13-1717. It has been our policy not to disturb the sentence imposed by the trial court, absent a clear abuse of discretion, when it is within the statutory limits. *State v. Toney*, 113 Ariz. 404, 555 P.2d 650 (1976); *State v. Moody*, 67 Ariz. 74, 190 P.2d 920 (1948). However, the gravity of the death penalty requires that we painstakingly examine the record to determine whether it has been erroneously imposed. *State v. Maloney, supra.* Furthermore, because A.R.S. § 13-454 sets out the factors which must be found and considered by the sentencing court, we necessarily undertake an independent review of the facts that establish the presence or absence of aggravating and mitigating circumstances, *e.g., State v. Murphy, supra; State v. Verdugo*, 112 Ariz. 288, 541 P.2d 388 (1975). We must determine for ourselves if the latter outweigh the former when we find both to be present.

In performing this review we find it necessary to determine whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factors; whether the evidence supports the sentencing court's finding the existence of a statutory aggravating circumstance(s); whether the evidence supports the sentencing court's finding the absence of the statutory mitigating circumstance(s); whether mitigating circumstances found to be present are sufficiently substantial to call for leniency; and, whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *Accord Gregg v. State*, 233 Ga. 117, 210 S.E.2d 659 (1974), *aff'd, Gregg v. Georgia, supra* (1976). Because A.R.S. § 13-454(C) directs the court to set forth in writing its findings on the existence or nonexistence of each of the circumstances, a meaningful appellate review of each death sentence is facilitated.

VIII.

The defendant's final contention is that the imposition of the death penalty is excessive. In this case the sentencing court found two aggravating circumstances to be present: 1) the defendant was previously convicted of a felony in the United States involving the use of a threat of violence on another person, and 2) the defendant committed the offense in an especially heinous, cruel or depraved manner.

The state submitted copies of the defendant's photograph, fingerprint record and commitment order, all certified by the Arizona State Prison Records Officer. The state also called the victim in the prior conviction, and that witness identified the defendant as the one who had kidnapped him at knifepoint. The sentencing court did not err in finding the existence of the first aggravating circumstance. A.R.S. § 13-454(E)(2).

The defendant argues that the terms "an especially heinous, cruel, or depraved manner" are so imprecise and indefinite as to leave the discretion of the sentencing authority virtually unfettered. Because the second aggravating circumstance has been established a resolution of this issue is not necessary. We note, however, that the Florida Supreme Court defined strikingly similar terms [3] as being directed only at the conscienceless or pitiless crime which is unnecessarily torturous to the victim. *State v. Dixon*, 283 So.2d 1 (Fla.1973); *see also Alford v. State*, 307 So.2d 433 (Fla.1975); *Halliwell v. State*, 323 So.2d 557 (Fla.1975). This construction was found not to be impermissibly vague by the United States Supreme Court. *Proffitt v. Florida, supra.*

At the sentencing hearing the defendant called two psychiatrists in an attempt to place the first mitigating

[3] "The capital felony was especially heinous, atrocious, or cruel." Fla.Stat. § 921.141(5)(h), F.S.A.

circumstance into issue. That circumstance reads as follows:

> "F. Mitigating circumstances shall be the following:
>
> "1. [Defendant's] capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution." A.R.S. § 13-454(F)(1)

This circumstance can be established by demonstrating either of two conditions: an impairment of the capacity to appreciate wrongfulness or an impairment of the capacity to conform. In neither case need the impairment be so great as to constitute a defense to prosecution.

The first condition involves a cognitive deficiency. Under Arizona law, when a defendant's capacity to appreciate the wrongfulness of his conduct is totally impaired that constitutes a defense to prosecution under the M'Naghten rule because the defendant did not know what he was doing was wrong. *State v. Sisk*, 112 Ariz. 484, 543 P.2d 1113 (1975); *Lauterio v. State*, 23 Ariz. 15, 201 P. 91 (1921); M'Naghten's Case, 10 Clark & Fin. 200, 8 Eng. Reprint 718 (1843). By enacting A.R.S. § 13-454(F)(1), the legislature has directed the sentencing court to take into account as a mitigating circumstance a deficiency in the cognitive process, which while significant, is insufficient to constitute a defense to the crime.

The second condition raises an issue heretofore not found in this state's criminal law. A.R.S. § 13-454(F)(1) directs the sentencing court to consider a significant impairment of the defendant's capacity to conform his conduct to the requirements of law. Thus, the legislature has authorized an inquiry into the volitional aspects of the human mind for the limited purpose of determining the sentence to be imposed on persons already convicted of first-degree murder. Because this provision in no way disturbs this state's long-standing adherence to the

M'Naghten rule of criminal responsibility, no impairment, no matter how great, of a defendant's volitional capacity can constitute a defense to crime. *See State v. Schantz*, 98 Ariz. 200, 403 P.2d 521 (1965).

The psychiatric testimony offered by the defendant characterized him as a sociopath, that is, a person with a character or personality disorder. The threshold question presented is whether a character or personality disorder qualifies as an impairment within the meaning of A.R.S. § 13-454(F)(1). We believe it does not.

Our conclusion that character or personality disorders are not mitigating circumstances within the meaning of the statute is based upon an analysis of the section in question and its origin.

The impairment of capacity described in A.R.S. § 13-454(F)(1) is one which is significant but not to such a degree to constitute a defense. For an impairment to be considered a defense, an accused must be suffering from a mental disease or defect which renders him unable to appreciate the nature or wrongfulness of his conduct. *State v. Schantz, supra.* A psychopathic or sociopathic condition has never been accepted as a defense to a criminal act in Arizona. *State v. Crose*, 88 Ariz. 389, 357 P.2d 136 (1960).

In the Mental Health Code the legislature has defined mental disorders as excluding character and personality disorders. A.R.S. § 36-501(18). This indicates another instance when the legislature has distinguished between significant mental disorders and character and personality disorders.

Of greater significance, however, is the fact that the language adopted by the legislature for the section in question is similar to that used in the Model Penal Code [4]

[4] "Section 4.01. Mental Disease or Defect Excluding Responsibility.

"(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirement of law.

"(2) As used in this Article, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct." Model Penal Code, § 4.01 at 66 (Proposed Official Draft, 1962).

of the American Law Institute. The Model Penal Code excludes character or personality disorders as an element excusing criminal responsibility. The reason for such exclusion is explained in the comments to the model code:

> "The reason for the exclusion is that, as the Royal Commission puts it, psychopathy 'is a statistical abnormality that is to say, psychopath differs from a normal person only quantitatively or in degree, not qualitatively; and the diagnosis of psychopathic personality does not carry with it any explanation of the causes of the abnormality.'" Model Penal Code, Comments § 4.01 at 160 (Tentative Draft No. 4, 1956.)

See also Cleckley, *The Mask of Sanity* (Fourth Edition 1964); Cavanagh, *Problems of a Psychiatrist in Operating Under the M'Naghten, Durham and Model Penal Code Rules*, 45 Marquette Law Review 478 (1962); Symposium, *The Socoipathic Criminal Offender: What To Do With Him?* 34 University of Cincinnati Law Review 1 (1965).

We are convinced that the legislature was influenced by the position of the American Law Institute concerning personality or character disorders. We conclude that the legislature did not mean to include such disorders as mitigating circumstances in determining the penalty for first-degree murder.

The burden of establishing mitigating circumstances is on the defendant. A.R.S. § 13-454(B). Because both of the defendant's expert witnesses characterized him as

a sociopath the sentencing court was correct in finding the absence of the first mitigating circumstance. In our review we do not find evidence of the presence of any of the other statutorily prescribed mitigating circumstances.

If the superior court finds one or more of the aggravating circumstances and no mitigating circumstances, it shall impose the sentence of death. A.R.S. 13-454 (D). A similar statutory scheme was approved in *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). The superior court correctly applied the statute in the instant case.

Pursuant to A.R.S. § 13-1715 we have reviewed all of the rulings and the findings of the superior court on the convictions and sentence of the defendant. We find no reversible error.

Judgment of conviction and sentence affirmed.

CAMERON, C. J., STRUCKMEYER, V. C.J., and HAYS and GORDON, JJ., concur.

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

(Caption Omitted in Printing)

[EXCERPT OF PROSECUTING ATTORNEY'S ARGUMENT, RESENTENCING HEARING HELD ON MARCH 13, 1980]

[TRANSCRIPT PAGES 86-87]

* * * *

With regard to Aggravated Circumstances No. 6, it is the State's position that the evidence in this case, which this Court heard and which the Court has agreed it will consider in accordance with the statutes, which establishes that this offense was one that was committed in a particularly heinous, cruel and depraved manner. I would ask the Court to take the fact that Mr. Bernard Crummet was beaten by Mr. Richmond with his fists. Then while he was down on the pavement, he was beaten by Mr. Richmond with rocks. He was then run over with a car twice. That is a particularly cruel and heinous way in which to commit the crime of murder, which is likely to cause a great amount of anguish, fear, pain and suffering to the victim. Obviously, we are unable to call the victim as a witness to establish those elements, but I think circumstantially the evidence in this case establishes that.

And I would ask the Court to read State vs. Richmond; the initial decision. Again, I am sure, as the Court has noted, the Supreme Court did not rule on whether or not they agreed with this Court in its previous ruling

with regard to Aggravating Circumstance No. 6; and so there is no guidance in that decision other than their reference to Florida cases. The State would still urge that this is a crime that was committed in a particularly cruel and heinous manner and that Aggravating Circumstance No. 6 has, in fact, been established in this case.

* * * *

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

(Caption Omitted in Printing)

[EXCERPT OF DEFENSE COUNSEL'S ARGUMENT, RESENTENCING HEARING HELD OF MARCH 13, 1980]

[TRANSCRIPT PAGES 93-97]

* * * *

MR. MINKER: Well, we then come to Circumstance No. 6, which is the State's fourth alleged aggravating circumstance.

At this time, I wish to call the Court's attention to two cases within the last six months, which deal with the subject of what is especially cruel, henious or depraved under Arizona law. The first case I want to call the Court's attention to, *State* vs. *Brookover*, Supreme Court No. 4426. This case was filed on October 2nd, 1979 in the Arizona Supreme Court. The Arizona Supreme Court set aside the death penalty in that case because it found that the trial court was incorrect in coming to the conclusion that the killing in that case took place in an especially cruel, heinous and depraved manner. The facts in that case, which the trial court found, were that "the murder of Gregory Case, by shooting him in the back and while helpless on the floor, for either or both of the reasons mentioned, is an especially heinous, cruel and depraved act."

Despite that finding by the trial court, the Arizona Supreme Court held that that was wrong and discussed —I am reading now—"The Florida Supreme Court has discussed the meaning of 'heinous,' 'atrocious,' and

'cruel' as applied to conduct which may be considered in applying the death penalty." I am quoting now from *State* vs. *Dixon*, a Florida case which is cited within Brookover.

"It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with other indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is necessarily torturous to the victim."

The Supreme Court then discussed *State* vs. Watson and recalled how in *State* vs. *Watson* that it found that cruel and heinous was not to be applied to that killer. Then in the Brookover case, the Court went on to say: "In the instant case, the victim was shot twice in the back. While certainly cowardly, it was not done in a particularly cruel or depraved manner. This was not a 'conscienceless or pitiless crime which is unnecessarily torturous to the victim.' The actions of the defendant did not set his acts apart from the norm of first degree murder."

The other case that I wish to call to the Court's attention is *State* vs. *Lujan*, L-u-j-a-n; No. 4423; filed November 26, 1979 by the Arizona Supreme Court.

In *State* vs. *Lujan*, the court recalled language from its own earlier case of *State* vs. *Knapp*. The court said that the words "heinous, cruel or depraved" have meanings that are clear to a person of average intelligence and understanding. Webster's Third New World International Dictionary defines them as follows: "Heinous: hatefully or shockingly evil; grossly bad;" "Cruel: disposed to inflict pain especially in a wanton, insensate or vindictive manner: sadistic;" "Depraved: marked by debasement, corruption, perversion or deterioration."

The text of Lujan goes on further to say: "Moreover, it is important to emphasize that A.R.S. 13-456 E.6 requires that the killing be especially—" and the court underlined the word especially—"especially heinous, cruel or depraved. The manner in which the murder was committed must be such as to—" and then it quotes the language from Brookover.

"In determining whether a murder has been committed in an especially heinous or depraved manner, we must necessarily consider the killer's state of mind at the time of the offense. This state of mind may be shown by his behavior at or near the time of the offense. Thus we have found those additional factors which make murder especially heinous or depraved." Then the court goes on to consider some previous cases in which it did find those conditions to be present. It cites, for example, in 114 Az. 199, *State* vs. *Blazak* as discussed in *State* vs. *Knapp* and *State* vs. *Ceja*, 115 Az. 413.

Then this case, this case Lujan, the court considers what the trial judge observed and found.

"The trial judge relied on the following factors: the helplessness of the victim; the lack of of necessity for the killing to accomplish the defendant's plan to steal; and the magnitude of the wound inflicted demonstrating a clear intent to kill. We agree with the trial court that these factors existed, but we do not agree that they indicate that the killing was accomplished in an especially heinous or depraved manner."

I think these two cases, Your Honor, argue well that the State has not borne its burden today or this week in showing that the August, 1973 killing of Bernard Crummet was committed in an especially cruel, heinous or depraved manner by Willie Richmond. Those factors which the Court, our Court, has discussed has simply not appeared in the record as the State is required to show them. The statute requires, Your Honor, that the aggravating circumstances be weighed against the mitigating circumstances. The only test the statute suggests

or commands is for the Court to determine whether or not the mitigating circumstances are sufficient to call for leniency; that is, if my recollection of the exact test of the statute is accurate.

When I began yesterday morning, Your Honor, I began to list the mitigating factors in this case.

THE COURT: I believe we have gone into that phase of your argument.

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IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

(Caption Omitted in Printing)

[EXCERPT OF MINUTE ENTRY DATED MARCH 13, 1980, JUDGMENT AND SENTENCE]

[MINUTE ENTRY PAGES 3-5]

• • • •

Both sides state they have no further evidence to offer.

Counsel argue to the Court.

No legal cause having been shown to the Court why sentence should not be announced,

As to Count I, pursuant to section 13-454(c), the Court returns the following special verdict as to the findings of existence and nonexistence of circumstances set forth in subsections (e) and (f).

As to subsection (e), that is the aggravating circumstances to be considered.

As to item 1,

THE COURT FINDS that the Defendant has been convicted of another offense in the United States, for which under Arizona law a sentence of life imprisonment was imposable, that being case no. A-24176 in the Superior Court of Pima County, State of Arizona.

As to that finding,

THE COURT FURTHER FINDS that if this case is not properly includable under this section, it is properly includable under item 2.

As to item 2,

THE COURT FINDS that the Defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person, that being case no. A-17969, in the Superior Court of Pima County, State of Arizona.

As to items 3, 4 and 5,

THE COURT FINDS nonexistence of those items.

As to item 6,

THE COURT FINDS that the Defendant did commit the offense in this case in an especially heinous and cruel manner.

As to subsection (f), mitigating circumstances.

As to item 1,

THE COURT FINDS that the Defendants' capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law was not significantly impaired.

As to item 2,

THE COURT FINDS that the Defendant was not under unusual or substantial duress.

As to items 3 and 4,

THE COURT FINDS nonexistence of those items.

As to item 5, as to the Defendant's age, the Court will make a finding on that also.

THE COURT FINDS that the Defendant was aged twenty-five years at the time of the offense and finds that the age in this case is not a mitigating factor.

The defense having raised certain specific items for the Court's consideration as mitigating factors and having requested that the Court make findings as to those mitigating factors, the Court will do so.

As to item 1,

THE COURT FINDS that Rebecca Corrella was involved in the offense but was never charged with any crime.

As to item 2,

THE COURT FINDS that Faith Irwin was involved in the offense but was never charged with any crime.

As to item 3,

THE COURT FINDS that the victim had engaged in an illegal act of prostitution with Rebecca Corrella near the time of the offense, and,

THE COURT ALSO FINDS that the victim had solicited an illegal act of prostitution with Faith Irwin, a minor, near the time of the offense.

As to item 4,

THE COURT FINDS that the jury was instructed both on the matters relating to the felony murder rule, as well as matters relating to premeditated murder.

As to item 5,

A finding has already been made.

As to item 6,

The Defense claims that the character of the Defendant has changed substantially for the better since the time of the conviction of the offense, and to this item, the Court is unable to make a definitive finding.

As to item 7,

THE COURT FINDS that the Defendant's family is supportive of the Defendant and will suffer considerable grief as a result of any death penalty that might be imposed.

The Court has considered all of the items raised by the Defense on the question of mitigating circumstances.

THE COURT FURTHER FINDS that considering both the enumerated circumstances in the statutes and the enumerated circumstances raised by the Defense, and having considered them separately and as a whole,

THE COURT FINDS that there are no mitigating circumstances sufficiently substantial to call for leniency.

The jury having heretofore returned a verdict of GUILTY to FIRST DEGREE MURDER, and,

The Court having heretofore entered a judgment of GUILT as to that charge on February 27, 1974,

IT IS THE JUDGMENT OF THE COURT that the Defendant be sentenced to Death.

• • • •

KATHY CLINE
Deputy Clerk

SUPREME COURT OF ARIZONA
EN BANC

No. 2914

STATE OF ARIZONA,
Appellee,

v.

WILLIE LEE RICHMOND,
Appellant.

May 12, 1983

Rehearing Denied June 28, 1983

HOLOHAN, Chief Justice.

Appellant, Willie Lee Richmond, was found guilty of first degree murder on February 5, 1974, and was sentenced to death. This court affirmed the conviction and the sentence in *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41 (1976), *cert. denied*, 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1977). However, we later vacated the death sentence pursuant to *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978), *cert. denied*, 440 U.S. 924, 99 S.Ct. 1254, 59 L.Ed.2d 478 (1979), and remanded for resentencing.

After a sentencing hearing, appellant again was sentenced to death, from which sentence he now appeals. Additionally, appellant asks that we review the denial of his petition for post-conviction relief. We have jurisdiction pursuant to A.R.S. § 13-4031 and Rule 32.9, Arizona Rules of Criminal Procedure, 17 A.R.S.

The conviction arose from a 1973 incident where appellant and his 15-year-old girlfriend, Faith Erwin, accompanied Becky Corella and Bernard Crummett to a Tucson motel. Becky had arranged to perform an act of prostitution with Crummett. Becky informed appellant that Crummett was "loaded." Appellant decided to rob Crummett.

Appellant accompanied by the two women and Crummett drove to a deserted area outside Tucson ostensibly for Crummett to engage in another act of prostitution with Becky. Appellant stopped the car feigning a flat tire. Appellant alighted from the car and went to the passenger side where he pulled Crummett from the car. Appellant knocked Crummett to the ground, and, as Crummett lay on the ground, appellant hit him with several large rocks, causing Crummett to lose consciousness. Becky took the victim's watch and wallet from his pockets. Appellant and the two women left Crummett lying unconscious on the ground, but, before leaving, the vehicle was twice driven over him.

Medical testimony revealed that Crummett died of a compressive injury to the skull consistent with the excessive force of a wheel of a car. At trial Faith Erwin testified that appellant was the driver of the automobile when it was driven over the victim. Appellant claimed that Becky Corella was the driver.

NOTICE

Appellant claims a violation of his sixth amendment right to know the nature and cause of the accusation against him because the information did not put him on notice that he coud receive the death penalty, nor did it state what aggravating factors would be presented. Appellant did not raise this issue at the time he appealed his conviction, but, as we are required, pursuant to A.R.S. § 13-4035, to search the record for fundamental error, we will address this issue. Appellant was charged with first

degree murder in violation of A.R.S. § 13-451, § 13-452 and § 13-453.[1] At that time § 13-453 provided that "a person guilty of murder in the first degree shall suffer death or imprisonment in the state prison for life." In *State v. Blazak*, 131 Ariz. 598, 643 P.2d 694 (1982), we addressed the issue raised by appellant, and we held that an indictment charging first degree murder was sufficient on its face to inform the defendant of the crimes charged and the sentences which could be imposed. Due process requires that a defendant be advised of the specific charges against him. The information in this case gave appellant adequate notice of the charges. There is no requirement that a defendant be advised in the indictment or information of the statutory penalty, or that he be advised what aggravating circumstances will be presented at sentencing in the event of a conviction.

SPEEDY TRIAL

Appellant was first sentenced to death in February of 1974. He was resentenced to death in 1980. Now appellant claims he was denied his right to a fair and speedy sentencing, and that he was prejudiced by the six-year gap which deprived him of the ability to effectively present his case for mitigation. We addressed this issue in *State v. Blazak*, *supra*, where we stated, "[n]either this court nor the United States Supremt Court has found that the right to a speedy trial extends to sentencing." 131 Ariz. at 600, 643 P.2d at 696, citing *State v. Steelman*, 126 Ariz. 19, 612 P.2d 475 (1980).

The delay resulted in the appellant having an opportunity to present additional evidence as mitigation. Additionally, appellant has failed to show how he was prejudiced. He was afforded the opportunity to present his original mitigating evidence as well as any additional mitigating factors which may have been omitted in the

[1] These are section numbers under the old criminal code, they have since been renumbered or repealed.

first sentencing hearing or which have arisen since that hearing. The sentence he received at his resentencing was no harsher than the original sentence. We are unable to find any prejudice resulting from the delay.

RESENTENCING UNDER WATSON

On numerous occasions this court has heard and rejected arguments that resentencing under *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978), *cert. denied* 440 U.S. 924, 99 S.Ct. 1254, 59 L.Ed.2d 478 (1979) is unconstitutional. Appellant asserts several grounds for this argument claiming the resentencing is: (1) a violation of ex post facto prohibitions; (2) a violation of double jeopardy prohibitions; and (3) a violation of the due process and separation of powers requirements because it is a judicially created penalty. We have addressed these issues many times before with resolutions adverse to appellant. *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983); *State v. Blazak*, 131 Ariz. 598, 643 P.2d 694 (1982); *State v. Jordan*, 126 Ariz. 283, 614 P.2d 825, *cert. denied*, 449 U.S. 986, 101 S.Ct. 408, 66 L.Ed.2d 251 (1980). These arguments have also been considered and rejected by the Ninth Circuit Court of Appeals in *Knapp v. Cardwell*, 667 F.2d 1253, *cert. denied*, —— U.S. ——, 103 S.Ct. 473, 74 L.Ed.2d 621 (1982).

SENTENCING CHALLENGES

The sentencing procedure is contested by appellant on three other grounds. First, that he was denied his alleged constitutional right to have a jury decide the presence of aggravating or mitigating circumstances. We have previously rejected this argument. *State v. Gretzler*, *supra*; *State v. Blazak*, *supra*; *State v. Watson*, *supra*. Second, appellant contends it is unconstitutional to place the burden of proof of mitigating circumstances on the defendant. Once the defendant has been found guilty beyond a reasonable doubt, due process is not offended by requiring the

defendant to establish mitigating circumstances. As we stated in *State v. Smith*, 125 Ariz. 412, 416, 610 P.2d 46, 50 (1980), "[f]acts which would tend to show mitigation are peculiarly within the knowledge of a defendant."

Third, appellant claims he was denied his right to be sentenced by an impartial trier of fact. This contention is based on evidence which was introduced at the original sentencing. At the first sentencing hearing, defense counsel presented psychiatric testimony which classified appellant as a sociopath or psychopath. This condition was described as one who never learns from experience, has poor impulse control, has a lack of moral insight and shows very little guilt. The psychiatrists characterized appellant as callous, grossly selfish, irresponsible and impulsive. This testimony was introduced as mitigation.

Under the Arizona death penalty statute in effect at the time, the judge could consider *only* four enumerated factors as mitigation. One of the statutory mitigating circumstances was that "the defendant's capacity to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution." [2] The psychiatric testimony was intended to show the existence of this particular mitigating factor. The judge did not find this factor to exist.

Five years later, when this court ordered a resentencing, the case was returned to the original trial judge. Appellant's request for a change of judge was denied by the presiding judge.[3] At the time of the resentencing, the Arizona death penalty statute, A.R.S. § 13-703, required that the judge who heard the case also conduct the sen-

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[2] Former A.R.S. § 13-454(F)(1), renumbered as A.R.S. § 13-703(G)(1).

[3] The motion was denied because it was not timely made. We will, however, examine this contention for fundamental error.

tencing. *State v. McDaniel*, 127 Ariz. 13, 617 P.2d 1129 (1980). The statute has recently been amended to allow a judge other than the trial judge to conduct the sentencing hearing if the trial judge has died, resigned, or become incapacitated or disqualified.

A litigant is entitled to an impartial judge at any stage of the proceedings. *See, State v. Barnes*, 118 Ariz. 200, 575 P.2d 830 (App.1978). However this does not include a judge totally ignorant of the previous proceedings. Any judge who might have conducted the resentencing in this case would have before him the record of the trial and the original sentencing hearing. Appellant presents no evidence that the sentencing judge entertained actual bias or prejudice against him. We stated in *State v. Greenawalt*, 128 Ariz. 150, 168, 624 P.2d 828, 846 *cert. denied*, 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981), "evidence is not inadmissible simply because it paints a black picture of the defendant's character or his bent for evil." Without some specific showing of bias on the part of the sentencing judge, we cannot say appellant was prejudiced or deprived of due process. From time to time appellate courts send cases back to a trial court for resentencing. The fact of resentencing is not sufficient, standing alone, to infer bias or prejudice.

The psychiatric evidence of the first mitigation hearing was not used in the second hearing, and there was no reference to that evidence in the second hearing.

Additionally, in each case where the death penalty is imposed, this court conducts an independent review of the record to assure a just result. We have reviewed the record in the instant case, and find no evidence of prejudice exhibited by the sentencing judge.

FELONY MURDER AND THE DEATH PENALTY

The jury which convicted appellant was instructed on both theories of first degree murder—premeditation and felony murder. The jury returned a verdict of first

degree murder. There is no indication in the record whether the jury's verdict was based on premeditation or felony murder.

The appellant contends that under the state of the record in this case the penalty of death cannot be imposed. The United States Supreme Court recently discussed the issue of felony murder in *Enmund v. Florida*, —— U.S. ——, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). The Court observed:

> Enmund himself did not kill or attempt to kill; and as construed by the Florida Supreme Court, the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder. Yet under Florida law death was an authorized penalty because Enmund aided and abetted a robbery in the course of which a murder was committed.

Id. at ——, 102 S.Ct. at 3377, 73 L.Ed.2d at 1152. The Court concluded that death was not a valid penalty for one who neither took life, attempted to take life, nor intended to take life.

By comparison, in the instant case appellant was an active participant. Appellant admitted he planned the robbery, drove the victim into the desert and knocked the victim unconscious to rob him. Faith Erwin testified that appellant threw rocks at the victim after he knocked him to the ground. Bloody rocks were found at the scene. The medical examiner testified that there were two kinds of force applied to the victim's skull—one which was consistent with the automobile tire and another in which there was external application of a pointed object. There is, however, no evidence that the latter force alone would have killed the victim.

Even if we accept appellant's contention that he was not driving the car when the victim was run over, we do not believe this case falls within the parameters of

Enmund. The facts from the appellant's version indicate that he was the leader of the group; he was the first to use violent force on the victim; he was aware that the victim, if allowed to live, could identify him. Appellant, from his version of the facts, was willing to leave the wounded and unconscious victim alone in the desert to an uncertain fate. Appellant contends that Becky Corella was the one who drove the car over the victim. There is no evidence that appellant protested or showed any emotion when the victim was twice run over. The appellant's version of the facts indicates appellant played an integral part in the events which caused the victim's death, and he willingly assisted in the acts which were intended to cause the victim's death.

The evidence presented by the state was that the appellant drove the vehicle over the victim, thus killing him. The testimony of Faith Erwin was that the appellant was the driver at the time the victim was run over. The circumstantial evidence supports Faith's testimony. The circumstances show that appellant was the driver when the group left for the desert. The other woman, Becky Corrella, was so short in stature that it was difficult for her to operate an automobile. Appellant was the leader of the group and directed the operation. With such support we believe the trial judge was justified in concluding that appellant drove the vehicle that was used to kill the victim.

Under either version of the facts appellant does not fit within the sphere of defendants the *Enmund* court seeks to protect from capital considerations. The evidence in this case shows that appellant intended to take a life.

PRIOR CONVICTION

Appellant was convicted in the instant case on February 5, 1974. He was convicted of another murder on August 9, 1974, even though that murder had occurred before the murder in the instant case. At the resentencing in 1980 the State sought to use this later conviction as an aggravating factor. Appellant argues this was improper.

A.R.S. § 13-703(F) enumerates aggravating circumstances which should be considered in determining the imposition of the death penalty. A.R.S. § 13-703(F)(1) states that "the defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable." Citing *State v. Ortiz*, 131 Ariz. 195, 639 P.2d 1020 (1981), *cert. denied*, 456 U.S. 984, 102 S.Ct. 2259, 72 L.Ed.2d 863 (1982), appellant contends the trial court erred in finding this aggravating circumstance.

In *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983), this court stated:

> Convictions entered prior to a sentencing hearing may thus be considered regardless of the order in which the underlying crimes occurred, *State v. Jordan*, [*supra*,] or the order in which the convictions were entered. [*State v. Valencia*, 124 Ariz. at 139, 602 P.2d at 807, 809 (1979)].
>
> Any language suggesting the contrary in *State v. Ortiz*, *supra*, [131 Ariz. at 210-11, 639 P.2d at 1035-36] is hereby disapproved. In *Ortiz*, we found the trial court erred in considering a contemporaneous conviction for conspiracy to commit murder as aggravation for the murder. This exclusion from consideration is best understood as having been required because both convictions arose out of the same set of events.

135 Ariz. at 57, n. 2, 659 P.2d at 16, n. 2.

In light of the language in *Gretzler*, the trial court did not err in finding the prior murder conviction to be an aggravating circumstance.

CRUEL AND HEINOUS

The trial court found as another aggravating factor that the offense had been committed in an especially cruel and heinous manner pursuant to A.R.S. § 13-703 (F)(6) which provides: "The defendant committed the offense in an especially heinous, cruel or depraved manner." Appellant contends this was error.

"Cruel" has been defined as "disposed to inflict pain especially in a wanton, insensate or vindictive manner: sadistic." *State v. Knapp*, 114 Ariz. 531, 562 P.2d 704 (1977), *cert. denied*, 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978). Cruelty involves the victim's pain or suffering before death. *State v. Gretzler*, *supra*; *State v. Poland*, 132 Ariz. 269, 645 P.2d 784 (1982); *State v. Lujan*, 124 Ariz. 365, 604 P.2d 629 (1979). The offense must be committed in an *especially* cruel, heinous or depraved manner to be considered an aggravating circumstance. *State v. Lujan*, *supra*. We do not find the offense to be especially cruel; there is no evidence in the record to indicate the victim suffered more pain than that of the initial blow which rendered him unconscious.

"Heinous" has been defined as "hatefully or shockingly evil; grossly bad," and "depraved" is "marked by debasement, corruption, perversion or deterioration." *State v. Knapp*, *supra*. Heinous and depraved involve the mental state and attitude of the offender as reflected in his words and actions. *State v. Gretzler*, *supra*; *State v. Poland*, *supra*; *State v. Lujan*, *supra*. In *Gretzler*, *supra*, we discussed factors which lead to a finding of heinousness or depravity. One factor is the infliction of gratuitous violence on the victim; another related factor is the needless mutilation of the victim. Here the victim was already unconscious and bleeding when he was run over not once, but twice, each time from a different direction. The evidence indicates that the first run by the vehicle was over the victim's head crushing his skull and killing him. The second run of the vehicle was over the body of

the victim. The investigating officers found, at the location of the murder, two large pools of blood separated by about 30 feet, which was consistent with the body having been run over and dragged to where it was found. Again the fact that the victim in the instant case was run over twice and his skull was crushed, we find to be a ghastly mutilation of the victim.

The presence of any one of the three elements—cruel, heinous, or depraved—is sufficient to constitute an aggravating circumstance. *State v. Bishop*, 127 Ariz. 531, 622 P.2d 478 (1980). We believe the facts of this case set it "apart from the normal first degree murders." *State v. Brookover*, 124 Ariz. 38, 601 P.2d 1322 (1979). The trial court was correct in finding the offense was committed in an especially heinous manner. It is also evident that the trial court could have found that the offense was committed in an especially depraved manner.

Appellant argues in the alternative that the "cruel, heinous and depraved" language of Arizona's death penalty statute is unconstitutionally vague and broad. We have addressed this contention in *State v. Gretzler*, *supra*, and found no constitutional infirmity in the statute.

The trial court judge did not find that "the defendant committed the offense as a consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value." A.R.S. § 13-703(F)(5). The trial court judge was under the mistaken belief that this subsection only applied to the "contract" type murder. Appellant was sentenced on March 13, 1980. This was prior to our decision in *State v. Clark*, 126 Ariz. 428, 616 P.2d 888, *cert. denied*, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed. 2d 612 (1980), where we specifically held that this aggravating circumstance is not limited to the "hired gun" or "contract" type killing. In *Clark* we stated that this subsection applies to any murder committed for financial gain.

The state addressed this issue in its answering brief, but did not raise the issue through a cross-appeal. Thus, we need not reach the issue of the propriety of this court finding an additional aggravating circumstance which was not found by the trial court.

MITIGATING CIRCUMSTANCES

At the 1980 sentencing hearing appellant presented evidence of his conduct in prison since 1974 when he first went to death row. Testimony was received from members of appellant's family, his friends, and from prison counselors which related appellant's good character, the change in attitude he has undergone and his attempts to better himself. Appellant contends the trial court erred in failing to find his improved conduct and character to be a mitigating circumstance. Appellant cites *State v. Watson (II)*, 129 Ariz. 60, 628 P.2d 943 (1981), where very similar evidence was presented as mitigation. There we held that the evidence could and should be considered a mitigating circumstance. While it would have been an arbitrary decision had the court refused to consider the evidence, it is clear from the record the court *did* consider the evidence but found it unpersuasive.

INDEPENDENT REVIEW

The sentencing statute, A.R.S. § 13-703, provides that the death penalty shall be imposed if the court finds one or more aggravating circumstances and "there are no mitigating circumstances sufficiently substantial to call for leniency." In death penalty cases, this court will conduct an independent examination of the record to determine for ourselves the presence or absence of aggravating and mitigating circumstances and the weight to give each. We also independently determine the propriety of the sentence. *State v. Gretzler, supra, State v. Blazak, supra.* The trial court correctly found three aggravating circumstances: first, that the defendant has been convicted of an offense (murder) for which life imprisonment or

death was imposable, A.R.S. § 13-703(F)(1); second, that the defendant has been convicted of a felony (murder and kidnapping) involving the use or threat of violence, A.R.S. § 13-703(F)(2); third, that the offense was committed in an especially heinous manner, A.R.S. § 13-703(F)(6).

As mitigating factors the court found that both Rebecca Corella and Faith Erwin were involved in the crime but were never charged, that the victim had engaged in an illegal act of prostitution with Rebecca Corella near the time of the offense and had solicited an act of prostitution with Faith Erwin, a minor, near the time of the offense. The court also found that the jury was instructed on the felony murder rule as well as on matters related to premeditated murder. Additionally, the court found appellant's family was supportive of him and would suffer considerable grief as a result of the imposition of the death penalty.

The trial court did consider evidence regarding appellant's change in character, but was unable to make a definitive finding on the matter. In *State v. Watson* (II), *supra*, we held that evidence revealing a substantial improvement of a defendant's character could be viewed as a mitigating factor. In the case at bench the trial court was not convinced that appellant's character had changed. We do not believe this position was unreasonable. The trial court was able to observe appellant at the resentencing hearing and listen to his testimony. The trial court was also aware appellant had been in a very controlled environment while his alleged change of character took place, with much to gain from his good behavior. Additionally the judge had evidence before him of the lifestyle appellant led before his incarceration, including the fact he was involved in another murder. These facts cast sufficient doubt upon appellant's veracity so the trial court could reasonably decline to find the proffered evidence to be a mitigating factor. The court further found

that there were no mitigating circumstances sufficiently substantial to call for leniency.

We believe the mitigation offered by appellant is not sufficiently substantial to outweigh the aggravating circumstances. Particularly we note the fact that this is not the first murder which appellant has perpetrated, as well as the gruesome manner in which this murder was committed. The death sentence is appropriate in this case.

PROPORTIONALITY REVIEW

We stated in *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41 (1976), *cert. denied*, 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1977), that we will conduct a proportionality review to determine "whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *Id.*, 114 Ariz. at 196, 560 P.2d at 51. We have considered other cases in which the defendants robbed and murdered their victims and received the death penalty. *State v. Gretzler, supra; State v. Clark, supra; State v. Jordan, supra; State v. Ceja*, 126 Ariz. 35, 612 P.2d 491 (1980); *State v. Evans*, 120 Ariz. 158, 584 P.2d 1149 (1978), *sentence aff'd*, 124 Ariz. 526, 606 P.2d 16, *cert. denied*, 449 U.S. 891, 101 S.Ct. 252, 66 L.Ed.2d 119 (1980). We find that the resolution in the instant case is not disproportionate to these cases.

Appellant likens his case to *State v. Watson* (II), 129 Ariz. 60, 628 P.2d 943 (1981), where we set aside the death sentence. Both cases involve a robbery and subsequent murder. Both defendants presented as mitigation evidence of a significant change in their character for the better, and both defendants received harsher sentences than their accomplices. However, the aggravating circumstances are very different in that the offense in *Watson* was not found to be especially heinous and depraved. Moreover, the defendant in *Watson* had only one prior conviction for robbery, while appellant in the instant case

has prior convictions for both kidnapping and murder in separate incidents. Additionally, in *Watson* there were other compelling factors in mitigation—the age of the defendant (21) and the fact that the victim was armed and fired the first shot. We believe the differences in the cases are so significant that the different resolutions are necessary.

CONSTITUTIONAL CHALLENGES

Appellant challenges the constitutionality of the Arizona death penalty statute claiming the statute, on its face and in application, is violative of the eighth amendment in that it allows for arbitrary and capricious determinations. We have previously considered and rejected this issue. *State v. Gretzler, supra; State v. Blazak, supra; State v. Richmond, supra.*

The death penalty was challenged by appellant in a Rule 32 petition for post-conviction relief on the ground that in Arizona this penalty has been imposed in a manner discriminatory against black persons. This post-conviction relief was denied and we granted his petition for review which we consolidated with this appeal. In addition, appellant claims he was denied due process of law when the court refused to hold a hearing on this claim. In a similar argument appellant claims the death penalty has been visited upon poor persons and male persons in disproportionate numbers. We agree with the state's assertion that neither the federal constitution nor this court has ever required that the imposition of the death penalty precisely reflect the composition of the general population. What the United States Supreme Court has required is guidelines to bridle the discretion of the sentencing authority, thus minimizing the risk of arbitrary imposition of the death penalty. *See Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Before one is subject to the death penalty in Arizona, the state must charge him and prove him guilty beyond a reasonable doubt. Then the state must prove aggravating circumstance(s) beyond a reasonable doubt. *State v. Jordan*, 126 Ariz. 283, 614 P.2d 825 (1980). The trial court may then find mitigating factors substantial enough to call for leniency. This court will then conduct an independent review of all matters of aggravation and mitigation to determine if the death sentence was properly imposed. *State v. Gretzler, supra; State v. Richmond, supra.* In addition, we conduct a proportionality review in every case to assure the penalty is not excessive nor disproportionate to the sentences imposed in similar cases. *State v. Gretzler, supra; State v. Richmond, supra.* These safeguards are blind to the color, wealth or sex of the defendant. We find no merit in appellant's argument.

We do not find it necessary to address appellant's last contention that the death penalty is a violation of international law.

We have examined the entire record for fundamental error, as required by A.R.S. § 13-4035, and find none.

The sentence of death is affirmed.

HAYS, J., concurs.

CAMERON, Justice, specially concurring.

I agree that the death penalty is properly imposed in this case. However, because I disagree with the majority in its holding that the crime was especially heinous and depraved, I feel that I must specially concur.

I do so not because I am insensitive to the tragic consequences of defendant's criminal conduct, but because I believe that if the death penalty statute in Arizona is to pass constitutional muster, it must be interpreted in such a way that only those who clearly come within the mandate of our legislature and the United States Supreme

Court are given this punishment. The death penalty is reserved only for those crimes which are above the norm of first degree murders, or for defendants who are above the norm of first degree murderers. *State v. Zaragoza*, 135 Ariz. 63, 68, 659 P.2d 22, 27-28 (1983); *State v. Watson*, 129 Ariz. 60, 63, 628 P.2d 943, 946 (1981).

The majority finds this crime to be especially heinous and depraved under A.R.S. § 13-703(F)(6), based on two of the criteria set out in *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983), the infliction of gratuitous violence on the victim, and the needless mutilation of the victim. I do not believe the facts of this case fit within the proper boundaries of these criteria.

The infliction of gratuitous violence was found and the death penalty imposed in *State v. Ceja*, 126 Ariz. 35, 612 P.2d 491 (1980), in which the defendant continued to shoot his victims after it was apparent they had been fatally wounded, and then began kicking one of the victims in the face repeatedly while the victim was already unconscious or dead. We said,

> We think that defendant's conduct in continuing his barrage of violence, inflicting wounds and abusing his victims, beyond the point necessary to fulfill his plan to steal, beyond even the point necessary to kill, is such an additional circumstance of a * * * depraved nature so as to set it apart from the 'usual or the norm.' 126 Ariz. at 40, 612 P.2d at 496, quoting *State v. Ceja*, 115 Ariz. 413, 417, 565 P.2d 1274, 1278 (1977). *See also State v. Gretzler, supra*, 135 Ariz. at 52, 659 P.2d at 11.

We similarly held that gratuitous violence was inflicted in *State v. Jeffers*, 135 Ariz. 404, 661 P.2d 1105 (1983), where after the killing the defendant climbed on top of the corpse and beat his face repeatedly with his fists, resulting in facial wounds and bleeding. In *State v.*

Woratzeck, 134 Ariz. 452, 657 P.2d 865 (1982), we also held that gratuitous violence was employed where the defendant strangled, stabbed and bludgeoned the victim to death, and the force used by each of these three methods was sufficient to kill. The death penalty was properly imposed in both *Jeffers* and *Woratzeck*.

In the instant case the victim was killed by being run over by an automobile. The evidence adduced at trial indicates the automobile was likely backed over the victim, and then driven forward over the victim. There is no evidence to suggest that the defendant knew or should have known that the victim was dead after the first pass of the car. *Cf. State v. Gerlaugh*, 134 Ariz. 164, 654 P.2d 800 (1982) (victim still alive after defendant ran over him with his automobile several times). Therefore, unlike the defendants in *Ceja*, *Jeffers*, and *Woratzeck*, *supra*, there has been no showing that this defendant inflicted any violence on the victim which he must have known was "beyond the point necessary to kill."

The criterion of mutilation of the victim was demonstrated by *State v. Vickers*, 129 Ariz. 506, 633 P.2d 315 (1981), where the defendant strangled to death his prison cellmate and then carved the word "Bonzai" into the victim's back. Similarly in *State v. Smith*, 131 Ariz. 29, 638 P.2d 696 (1981), after suffocating the female victims the defendant proceeded to multilate their sex organs and breasts with sharp objects. The death penalty was imposed in these two cases based in part on the finding that the crime was committed in a heinous and depraved manner. The facts of these cases are in marked contrast to the present case. Here there is no suggestion of distinct acts, apart from the killing, specifically performed to multilate the victim's body. Any disfigurement of the victim in this case was the direct result of the killing itself. I do not believe we should stretch the definition of "mutilation" to cover all murders in which the victim's body is disfigured, where there is no indication of a separate purpose to multilate the corpse.

It is true, of course, that the appearance of the victim in this case was "ghastly" as the majority states. But as the United States Supreme Court has recently said in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (reversing an application of Georgia's statutory aggravating circumstance of "outrageously or wantonly vile, horrible or inhuman"),

> [I]t is constitutionally irrelevant that the petitioner used a shotgun instead of a rifle as the murder weapon, resulting in a gruesome spectacle in his mother-in-law's trailer. An interpretation of [the aggravating circumstance] so as to include all murders resulting in gruesome scenes would be totally irrational. Id. at 433, n. 16, 100 S.Ct. at 1767, n. 16, 64 L.Ed.2d at 409, n. 16 (plurality opinion). *See also id.* at 435, 100 S.Ct. at 1768, 64 L.Ed.2d at 410-11 (Marshall, Brennan, J.J., concurring) ("[We] also agree that * * * the fact that the murder weapon was one which caused extensive damage to the victim's body is constitutionally irrelevant.")

Our statutory aggravating circumstance of a heinous or depraved killing focuses on the state of mind of the killer, *see State v. Graham*, 135 Ariz. 209, at 212, 660 P.2d 460 at 463; *State v. Jeffers*, *supra*, 135 Ariz. at 429-430, 661 P.2d at 1130-31; *State v. Zaragoza*, *supra*, 135 Ariz. at 68-69, 659 P.2d at 28-29; *State v. Gretzler*, *supra*, 135 Ariz. at 51, 659 P.2d at 10; *State v. Wortazeck*, supra, 134 Ariz. at 457, 657 P.2d at 870, not on the appearance of the corpse. Although the resulting scene was gruesome, I believe the proper application of the criteria discussed above fails to support a finding that the killer acted in a state of mind which was especially heinous or depraved. This crime is therefore not above the norm of first degree murders.

The criminal record of this defendant, however, clearly places him above the norm of first degree murderers. He has been convicted of another first degree murder and

a kidnapping, each arising in separate incidents. This history of serious violent crime justifies the imposition of the death penalty.

I concur in the opinion of the majority except its finding that this crime was heinous and depraved, and I concur in the result.

GORDON, Vice Chief Justice, concurring.

I concur in Justice Cameron's special concurrence.

FELDMAN, Justice, dissenting.

I cannot agree with that portion of the majority decision which holds that the death penalty may now be properly imposed upon the defendant.

I agree with Justice Cameron that the murder was not heinous and depraved. The remaining aggravating circumstances in this case were that defendant had been convicted of an offense for which life imprisonment or death was imposable, A.R.S. § 13-703(F)(1), and that defendant had been convicted of a felony involving the use or threat of violence, *id.* (F)(2). Both of these circumstances pertain to the character of the defendant, defining the type of murderer and serving to set the defendant apart and above the "norm" of killers. As we stated in *State v. Watson* (*Watson II*), 129 Ariz. 60, 63, 628 P.2d 943, 946 (1981):

> [T]he death penalty should be reserved for only the most aggravating of circumstances, circumstances that are so shocking or repugnant that the murder stands out above the norm of first degree murders, *or the background of the defendant sets him apart from the usual murderer.*

(Emphasis supplied.) As Justice Cameron correctly states, the crime here does not stand out "above the norm of first degree murders"; thus, the imposition of the death penalty in this case is clearly based upon the character of the defendant.

In *Watson II*, *supra*, we held that rehabilitation evidence could and should be considered a mitigating circumstance. *Id.* at 63-64, 628 P.2d at 946-47. Thus, *Watson II* stands for the proposition that the relevant question in such cases is not limited to defendant's character at the time of the offense, but also includes his character at the time the death penalty is to be carried out.

The majority opinion indicates that the evidence of defendant's improved conduct and character was "very similar" to that presented in *Watson II*, yet concludes that the mitigation evidence offered by defendant was not sufficiently substantial to call for leniency. While defendant's prior murder conviction weighs heavily against him, in my view the rehabilitation evidence "very similar" to that presented in *Watson II* tips the balance strongly in favor of reducing defendant's sentence to life imprisonment.

At the final sentence hearing, twelve individuals offered evidence of defendant's changed character and efforts to rehabilitate himself since his imprisonment in 1974. These witnesses included several members of his family, employees of the Arizona State Prison at Florence, a fellow prisoner on death row, and a local missionary who regularly visited and corresponded with the defendant. The theme which ran through all of the testimony at the sentence hearing was that defendant had changed remarkably since he had arrived at prison six years previously. The witnesses believed that defendant's attitude had improved materially, that he had found a purpose in life and now had a genuine desire to better himself and, more important, to help others. There seemed to be no question but that this desire to help others was more than subjective; it was actually carried into effect.

There were objective facts to support these opinions. Among the objective factors which manifested the change in defendant were the following: Defendant had trans-

formed himself into a literate person, learning to read and write. He had learned to type. Witnesses testified that defendant often read three books a week and exchanged reading materials with other prisoners. Defendant had employed his new-found ability to read, write and type by using his time in prison in a constructive manner, typing numerous letters to family and friends, and studying the Bible. The counselors employed at the prison testified that defendant provided encouragement, advice and spiritual assistance to both his family and to other prisoners.

Defendant's family noted the difference in his attitude. Defendant had become settled and matured. He was honestly trying to give some meaning to his life. From prison, both in the form of letters and visits from his family, defendant assisted them with their problems, gave them advice and encouraged them. He was truly concerned for his family's welfare. The same was true for his relationship with other prisoners.

The counselors employed by the prison also testified that defendant's attempts to better and rehabilitate himself were genuine. Of course, this is a matter of opinion, but it was uncontradicted and, in light of the experience of the prison counselors, I would place great weight on their assessment.

Finally, the defendant himself testified that if given life imprisonment he understood that he would never live outside prison, because the life sentence would and should be imposed consecutively to the other sentences which he was already serving. Nevertheless, he felt that he had changed and had something worthwhile to offer others in prison society and his family if he were allowed to live. Given the current problems of our prison system, it is certainly necessary that we provide inmates with role models and assistance for rehabilitation, especially when such models are based upon changes in attitude and

religious commitment.[1] The record available to us thus leads to an overwhelming conclusion that defendant has made a sincere, successful and continued effort to change his character, rehabilitate himself and contribute in his own way to society. As the majority indicates, the trial court could not make a "definitive finding" on the question of rehabilitation. While the majority speculates that the trial court was "not convinced" that defendant's character had changed, the fact is that the trial court made no such finding. The majority states that the facts "cast sufficient doubt upon appellant's veracity so the trial court could reasonably decline to find the proffered evidence to be a mitigating factor." Again, the trial court made no such statement. In any event, the rehabilitation issue does not turn primarily upon defendant's testimony at all. There were twelve other witnesess, unimpeached and unrebutted on the issue, and the proof of change, rehabilitation and contribution to society stands uncontested in this case. Nor is this change some desperate, last-minute attempt by defendant to avoid the death penalty. The testimony indicated that the change in defendant's attitude and character manifested itself long before 1981 when *Watson II* first established that

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[1] The conclusion that because of his change in character the defendant would serve as a useful role model for other prisoners is more than mere speculation. The May, 1983 issue of *La Roca*, a magazine published by and for prisoners at the Arizona State Prison, contains an article on defendant written by Charles Doss, a prisoner who serves as editor of the magazine. In an article commencing at page 19, entitled "Death Row Revisited," Mr. Doss writes of defendant's attitude and actions when he first came to death row ten years earlier and the remarkable change which has taken place with the passage of years. The article illustrates that both inside and outside the walls of the state prison a man's life and behavior may set an example which serves as a standard for others. The article is not part of the record, but the statute provides that mitigating evidence may be considered regardless of admissibility under the rules of evidence and may consist of "any factors" relevant to defendant's character. A.R.S. § 13-703(C) and (G).

such a change was relevant in deciding whether to impose death.

Thus, the majority's conclusion on independent review that the trial court could have found defendant's changed character was not genuine, and therefore "could reasonably decline to find the proffered evidence to be a mitigating factor" is incorrect for two reasons. First, the trial court made no such finding. Second, there are no facts to support such a finding, even if it had been made. The State advances no such facts in this court, though it does not admit the change in character is genuine. Of course, it is the State's obligation to examine any purported change in character with a deservedly cynical eye. I, too, agree that it would be better if felons found God before committing their crimes rather than before being punished. It is the court's obligation, however, to recognize the possibility and principle of redemption and rehabilitation.

Further, independent review on the death penalty issue involves more than a determination of whether the trial court's imposition of this penalty can be supported by the record. It requires our own, independent conclusion from the record. *Watson II*, 129 Ariz. at 63, 628 P.2d at 946. While the aggravating circumstances which were found to exist may indicate that the defendant was above the norm of murders, the evidence of changed character is persuasive mitigation. Review of this record indicates strong evidence of rehabilitation and the probability that if allowed to live, defendant will make a contribution of some value to society. Then what is to be gained by imposing death under these circumstances? Except in the physical sense, the defendant whom we today consign to the gas chamber is not the same person who committed the crime in 1973 and was first sentenced to death in 1974. While the passage of time should not be the test, we must acknowledge that in the ten years which it has taken to reach this point, the defendant has been given

time to change. Perhaps those ten years should not have been allowed to pass, but we must remember that the statutes under which the defendant was previously sentenced to death were declared unconstitutional, *State v. Watson* (*Watson I*), 120 Ariz. 441, 586 P.2d 1253 (1978), and, as a result, defendant has been given time which he has put to good use. While quick punishment may deter, punishment of this defendant at this time serves only to illustrate that redemption and rehabilitation have no practical purpose.

Speedy imposition of the ultimate penalty might also have served the societal interest in retribution. *See Gregg v. Georgia*, 428 U.S. 153, 183, 96 S.Ct. 2909, 2929-30, 49 L.Ed.2d 859 (1976). But, again, the imposition of death upon a defendant who has changed so remarkably serves no valid purpose as far as retribution is concerned, because we now visit society's retribution upon a different person. Nor is society protected by imposition of the death penalty since reduction to life imprisonment would ensure that this defendant would not become eligible for parole during his lifetime. By putting this defendant to death in the face of his efforts to change and the reasonable prospect that if allowed to live he will be of value to society, we accomplish nothing but revenge. To some, especially those in the heat of anger, this may seem a sufficient reason to kill. The law should not be swayed by such emotions; it does not and cannot kill in anger; it rejects the concept of an eye for an eye and a tooth for a tooth.

The totality of the evidence offered in mitigation establishes sufficient grounds for this court to reduce defendant's sentence to life imprisonment without possibility of parole for 25 years, to be served consecutively to all other sentences. Accordingly, I dissent from the portion of the opinion which, on independent review, affirms the imposition of the death sentence.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 86-2382

WILLIE LEE RICHMOND,
Petitioner-Appellant,

v.

SAMUEL A. LEWIS,* Director, Arizona Department of Corrections; and ROGER CRIST, Superintendent of the Arizona State Prison,
Respondents-Appellees.

Argued and Submitted Sept. 18, 1987

Submission Vacated Sept. 22, 1987

Reargued and Submitted Sept. 27, 1990

Decided Dec. 26, 1990

As Amended on Denial of Rehearing
and Rehearing En Banc Oct. 17, 1991

As Amended Jan. 14, 1992

Before ALARCON and O'SCANNLAIN, Circuit Judges, and STEPHENS,** District Judge.

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* Samuel A. Lewis and Roger Crist have been substituted for their respective predecessors in office, James R. Ricketts and Donald Wawrzaszek, pursuant to Federal Rule of Appellate Procedure 43(c)(1).

** The Honorable Albert Lee Stephens, United States District Judge for the Central District of California, sitting by designation.

ORDER

The opinion reported at 921 F.2d 933 (9th Cir.1990) is hereby amended as follows: in the block quotation in the second column on page 943 of the opinion, twenty-two lines from the bottom of the page, delete the ellipsis and insert in lieu thereof: "In [*State v.*] *Gretzler*, [135 Ariz. 42, 659 P.2d 1 (1983)] *supra*, we discussed factors which lead to a finding of heinousness or depravity. One factor is the infliction of gratuitous violence on the victim; another related factor is the needless mutilation of the victim."

The final paragraph in Part IV-D on page 947 of the opinion is hereby amended to read as follows:

In this case, there is no similar doubt. Elimination of the challenged factor would still leave enough support for Richmond's sentence because the statute at issue here is fundamentally different from the statute at issue in *Clemons* [*v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990)]. The Mississippi law that *Clemons* considered authorizes the death penalty if " 'there are insufficient mitigating circumstances . . . to *outweigh* the aggravating circumstances.' ". *Id.* 110 S.Ct. at 1446 n.2 (quoting Miss.Code Ann. § 99-19-101(3)(c) (Supp. 1989)) (emphasis added). Arizona's law mandates the death penalty "if the court finds *one or more* of the [enumerated] aggravating circumstances . . . *and* that there are no mitigating circumstances *sufficiently substantial to call for leniency.*" Ariz.Rev.Stat.Ann. § 13-703 (E) (emphasis added). The difference is significant: a conclusion by the Arizona courts that there are no substantial mitigating circumstances is separate from and independent of any conclusion regarding the existence of aggravating circumstances. Invalidation of an aggravating circumstance does not mandate reweighing or require resentencing where the court has found that the prosecution has met its burden of establishing agggravation sufficient to warrant the state's harshest penalty *two or*

three times and that the defense has failed to establish mitigating circumstances sufficiently substantial to call for leniency. *See id.* §§ 13-703(C), (E). Under the statute at issue in *Clemons*, the invalidation of an aggravating circumstance necessarily renders any evidence of mitigation "weightier" or more substantial in a relative sense; the same, however, cannot be said under the terms of the Arizona statute at issue here. Nothing in the Arizona statute suggests the need for plenary reweighing where the record still reveals that there are "one or more of the [enumerated] aggravating circumstances . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency." *Id.* § 13-703(E).

The panel has voted to deny the petition for rehearing. Judges Alarcon and O'Scannlain have voted to reject the suggestion for rehearing en banc and Judge Stephens so recommends.

On the request of a judge in regular active service, the suggestion for rehearing en banc was put to a vote of the full court, and the majority of the court voted to deny rehearing. Fed.R.App.P. 35(b). Judge Pregerson dissented from the denial of rehearing and was joined by Judges Hug, Norris and Reinhardt. The dissent is filed as an attachment to this order.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

OPINION

O'SCANNLAIN, Circuit Judge:

Willie Lee Richmond, who was sentenced to death upon conviction of first-degree murder in Arizona state court, appeals from the district court's denial of his petition for habeas corpus. He contends that imposition of capital punishment will violate his rights under the sixth, eighth, and fourteenth amendments. We now affirm.

I

A

This case arises from Richmond's conviction in 1974 for first-degree murder in the death of Bernard Crummett. On an August evening seventeen years ago, the victim met Rebecca Corella, a nude dancer, at the Bird Cage Bar in Tucson, Arizona. After leaving the bar, the pair met Richmond in the bar's parking lot where Corella attempted to persuade Richmond to allow his fifteen-year-old girlfriend, Faith Erwin, to prostitute herself with Crummett. Richmond and Erwin refused, and after a brief conversation, Corella agreed to have sex with Crummett herself. Crummett thereupon produced a twenty-dollar bill, which Corella handed to Richmond and which Richmond palmed and surreptitiously exchanged for a ten. A brief argument ensued as Richmond and Corella insisted that Crummett had only given them ten dollars.

Crummett eventually yielded and agreed to pay more. As he reached into his wallet a second time, Corella observed what seemed a considerable amount of cash, and she communicated her observation to Richmond. All four individuals then proceeded in a borrowed station wagon to Corella's motel-room apartment. There, just as Corellla and Crummett emerged from the bedroom, Richmond whispered to Erwin his intention that they rob Crummett, explaining that they should not commit the crime in the apartment because Crummett might remember the surroundings.

The group then left the motel and with Richmond as their driver proceeded to the end of a road on the outskirts of Tucson. Richmond thereupon stopped the car, and either Richmond or Corella—the testimony conflicts—told Crummett to get out because the car had suffered a flat tire. Richmond then assaulted Crummett, beating him with his fists and knocking Crummett to the ground.

As Crummett lay motionless, Richmond pelted him with rocks. Corella, meanwhile, grabbed Crummett's wallet. According to Erwin, who admitted that she was vomiting and "coming down" from heroin during the incident, the following events then transpired:

> Q. [Mr. Howard, Prosecutor] Then what happened?
>
> A. [Erwin]
>
> Well, they all got in the car, and Becky [Corella] was getting the wallet and what else, you know. I looked over to see what else was taken. And Becky [Corella] was getting the wallet and we came in the car and left.
>
> Q. And where did you go from there?
>
> A. Back to the Sands Motel.
>
> Q. Did you run over anything?
>
> A. Yes, a man. It was a bump, after we were leaving.
>
> Q. After you felt that bump, was anything said in the car when you felt that bump?
>
> A. Becky [Corella] said, it felt like a man's body.
>
> Q. Who was driving the car?
>
> A. Willy [sic.]

Under cross-examination, Erwin stood by her contention that Richmond had been the driver at the time the car ran over Crummett. She admitted, however, that she was suffering greatly under the influence of her drug injections at the time and that she was lying back on the car seat with her eyes closed.

The police found Crummett's body at five o'clock the following morning. The examining pathologist testified at trial that the body exhibited signs of three forms of extreme force. First, there were wounds and indentations in the head consistent with a contention that the victim had been pummeled with rocks. In conjunction with this observation, he noted that several bloodstained rocks were found in the immediate vicinity of the body. Second, he

testified that the victim's head had suffered severe trauma and "bursting" from a crush injury most probably attributable to an automobile tire. He identified this second injury as the probable cause of death. Third, he testified to the presence of a second crush injury along the trunk and abdominal section. This too the pathologist attributed to an automobile tire, which impacted the body from the opposite direction at least thirty seconds after the fatal blow. He concluded, therefore, that the victim was twice run over—once while alive but presumably unconscious and a second time after death. A police detective also testified to the discovery of human blood and hair on the undercarriage of the recovered station wagon.

Shortly after the night of Crummett's death, Richmond was arrested on two unrelated murder charges. As he awaited proceedings on those charges in jail, he was served with an arrest warrant for the murder of Crummett, and he agreed to waive his rights and make a statement at that time. Although he admitted to robbing and beating Crummett, he claimed that he was not the driver when Crummett was run over. In his statement, which was taped and played at trial, Richmond insisted:

> I opened the door. I snatched the dude out by his collar, and bam, he falls straight out. I wanted to go through his pockets, but she [Corella] was already going through his pockets and he was getting up and I reached down and punched him again. So my old lady, Faith [Erwin], she couldn't take it. She got out of the car and she looked and she started crying, you know. And about that time I am looking at her, and going through his change. And this rock, you know, like that, and dip, dip like that, you know. And I said, wow, to myself, you know. Come on let's get in the car and me and her [Erwin] get in the car, and I am talking to her [Erwin] and Rebecca [Corella] gets in the car and she backed up and she throws up in gear and comes back over. And we

were going on down further and she was all over the fucking road, and said, give me this mother-fucking car and let me drive, you know.

At the conclusion of the evidentiary phase of the trial, the judge instructed the jury that Richmond could be convicted of first-degree murder upon either a finding of premeditation or a felony-murder theory:

> Murder is the unlawful killing of a human being, with malice aforethought.
>
> * * * *
>
> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs as a result of the perpetration of, or attempt to perpetrate, the crime of robbery and where there was in the mind of the perpetrator the specific intent to commit such crime, is murder of the first degree.
>
> * * * *
>
> If a human being is killed by any one of several persons engaged in the perpetration of, or attempt to perpetrate, the crime of robbery, all person[s] who either directly and actively commit the act constituting such crime or who knowingly and with criminal intent aid and abet its commission or, whether present or not, who advise and encourage its commission, are guilty of murder in the first-degree, whether the killing is intentional, unintentional, or accidental.

Upon these and other instructions, the jury found Richmond guilty of first-degree murder on February 5, 1974.[1]

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[1] On August 9, 1974, Richmond was convicted of first-degree murder on one of the two unrelated charges and sentenced to life imprisonment. "It is not disputed that the killing that was the basis of th[at] conviction occurred prior to the murder of Bernard Crummett." *Richmond v. Ricketts*, 640 F.Supp. 767, 780 (D.Ariz. 1986). At the time of that earlier murder, "the death [penalty] had not yet become effective [in Arizona] so that the sentence of life imprisonment was the only possible sentence." *Id.* Richmond was acquitted of the other murder. *See id.*

B

After a separate hearing held before the trial judge alone, the court pronounced its sentence:

> The court rendered a special verdict finding the existence of two aggravating circumstances: 1) that the defendant was previously convicted of a felony involving the use or a threat of violence on other persons, and 2) that the defendant had committed the offense in an especially heinous and cruel manner. It found none of the statutory mitigating circumstances to be present. Based on its findings, the court sentenced the defendant to death.

State v. Richmond, 114 Ariz. 186, 189, 560 P.2d 41, 44, *cert. denied*, 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1976).

Richmond petitioned in state court for post-conviction relief claiming the discovery of new exculpatory evidence. He presented an affidavit from Daniel McKinney, a former boyfriend of Corella, in which McKinney stated that Corella had admitted to being the driver when the car ran over Crummett. The state countered with a transcribed tape recording in which McKinney claimed that Richmond had threatened him in prison. The petition for relief was denied. On automatic appeal, the Arizona Supreme Court affirmed both the conviction and the sentence, holding inter alia that (1) Richmond's case was properly submitted on a theory of felony murder, (2) post-conviction relief was properly denied, and (3) the Arizona death penalty statute was constitutional, both as written and as applied. *See* 114 Ariz. at 190-98, 560 P.2d at 45-53.

After the United State Supreme Court denied certiorari on direct appeal, Richmond petitioned for a writ of habeas corpus in the federal district court of Arizona. He argued that the Arizona statute unconstitutionally deprived him of the opportunity to present non-statutory mitigating

circumstances before the judge at sentencing. The district court upheld Richmond's conviction but ruled the Arizona statute unconstitutional under the eighth and fourteenth amendments for its failure to allow consideration of a convict's character. *Richmond v. Cardwell*, 450 F.Supp. 519 (D.Ariz.1978). The court therefore vacated Richmond's sentence.[2]

At a second sentencing hearing in March 1980, the state trial court again found no mitigating circumstances sufficient to warrant leniency, and it resentenced Richmond to death. Once again, on mandatory appeal, the Arizona Supreme Court affirmed the sentence. *State v. Richmond*, 136 Ariz. 312, 666 P.2d 57, *cert. denied*, 464 U.S. 986, 104 S.Ct. 435, 78 L.Ed.2d 367 (1983). Independently reviewing the record,[3] the state supreme court found that Richmond had actively participated in the robbery and had played an integral role in the events leading up to Crummett's death. Although it acknowledged that the force of Richmond's manual blows had not caused the death, the court held that circumstantial evidence supported Erwin's testimony that Richmond had been the lethal driver. It found that the sentence was appropriate under these conditions. Again on direct review, the United States Supreme Court denied certiorari. 464 U.S. 986, 104 S.Ct. 435, 78 L.Ed.2d 367 (1983).

Richmond then pursued a second writ of habeas corpus in federal court. After a brief hearing, the district court denied the writ and dismissed the petition. Four days later, a panel of this court stayed Richmond's execution and issued a certificate of probable cause to provide time for a full-fledged appeal. In due course, the court affirmed dismissal for failure to exhaust state remedies,

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[2] The Arizona death penalty statute was subsequently revised to cure this defect. *See* Ariz.Rev.Stat.Ann. § 13-703(G), *as amended by* 1979 Ariz.Sess.Laws ch. 144, § 1 (effective May 1, 1979).

[3] *See infra* note 10.

but it remanded with instructions to allow amendment to permit the prosecution of any claims that had been properly exhausted.[4] *Richmond v. Ricketts*, 730 F.2d 1318 (9th Cir.1984). Following such amendment, the district court again denied Richmond's petition, and this court again reversed, remanding for a full review of the state record. *Richmond v. Ricketts*, 774 F.2d 957 (9th Cir.1985). After reviewing the full record, the district court denied Richmond's petition for the third time in a thirty-five page opinion. *Richmond v. Ricketts*, 640 F.Supp. 767 (D.Ariz.1986).

Richmond now appears before this court with the assistance of counsel to appeal this most recent denial order. This court originally entertained oral argument in his appeal on September 18, 1987, but deferred submission pending the en banc decision of this circuit in *Adamson v. Ricketts*. *See* No. 84-2069 (9th Cir. Aug. 14, 1987) (en banc) (order scheduling oral argument for Oct. 20, 1987, in light of *Ricketts v. Adamson*, 483 U.S. 1, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987)). *Adamson* presented a similar challenge to the constitutionality of Arizona's revised death penalty statute. A year later, in December 1988, the *Adamson* court ruled the Arizona statute unconstitutional. 865 F.2d 1011 (9th Cir.1988) (en banc). Arizona petitioned the Supreme Court of the United States for review of that decision, and this court further deferred submission pending that outcome.

In the meantime, on direct review from the state's highest court, the Supreme Court of the United States announced in *Walton v. Arizona* that the Arizona death

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[4] Under the "total exhaustion rule" announced by the Supreme Court in *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), a federal court cannot adjudicate a habeas petition if it contains any unexhausted claims—even if it also contains exhausted claims. The remand order was intended to satisfy this rule. *See* 730 F.2d at 1318.

Upon amending his petition, Richmond continued to assert eighteen claims. *See* 774 F.2d at 959.

penalty statute is *not* unconstitutional. —— U.S. ——, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), *reh'g denied*, —— U.S. ——, 111 S.Ct. 14, 111 L.Ed.2d 828 (1990). In a companion case decided that same day, *Lewis v. Jeffers*, the Court restated and elaborated upon its *Walton* holding. —— U.S. ——, 110 S.Ct. 3092, 111 L.Ed.2d 606, *reh'g denied*, —— U.S. ——, 111 S.Ct. 14, 111 L.Ed. 2d 829 (1990). On the following day, the Court denied certiorari in *Adamson*. *Lewis v. Adamson*, —— U.S. ——, 110 S.Ct. 3287, 111 L.Ed.2d 795 (1990), *denying cert. to Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) (en banc).

In light of these developments, this court ordered the parties to file supplemental briefs, and on September 27, 1990, the court entertained a second oral argument to consider the effects of *Walton*, *Jeffers*, and other recent Supreme Court decisions on this appeal. The court thereafter took the entire appeal under submission for decision.

II

A

The district court had proper jurisdiction under 28 U.S.C. § 2241. This court has proper jurisdiction under 28 U.S.C. § 2253. We review the denial of a habeas corpus petition de novo. *See Weygandt v. Ducharme*, 774 F.2d 1491, 1492 (9th Cir.1985). However, under 28 U.S.C. § 2254(d), the factual findings of state trial and appellate courts are presumed correct if fairly supported by the record. *See Sumner v. Mata*, 449 U.S. 539, 546-47, 101 S.Ct. 764, 768-69, 66 L.Ed.2d 722 (1981).

B

Richmond has presented four arguments: (1) that Arizona's death penalty law is unconstitutional both on its face and as applied, (2) that the trial court never specifically found that he caused, intended to cause, or attempted to cause Crummett's death and that imposition of the death penalty would therefore violate the rule of *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), (3) that he was improperly denied an evidentiary hearing on his claim that Arizona's administration of the death penalty is unconstitutionally discriminatory, and (4) that fulfillment of his sentence after so many years on death row would constitute cruel and unusual punishment. Respondent Arizona has challenged all four contentions and has further argued that Richmond's petition constitutes an abuse of the writ. We address the state's latter contention first and then address Richmond's arguments sequentially.

III

In its 1978 judgment on Richmond's first petition for habeas relief, the district court vacated Richmond's sentence but affirmed his conviction. The State of Arizona argues that because Richmond failed to appeal the affirmance of his conviction at that time, it is abuse of the writ to challenge the conviction now. *See* 28 U.S.C. § 2244(b); Rules Governing Section 2254 Cases, Rule 9(b). A prior panel of this court has already addressed this contention. *See Richmond*, 774 F.2d at 959-61. We are bound to adopt its conclusions as the law of the case. *See Hondi Inv. Co. v. Mobil Oil Corp.*, 653 F.2d 391, 392 (9th Cir.1981); *see also* 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.404[1], at 119 (2d ed. 1988) ("If there is an appeal from the judgment entered after remand, the decision on the first appeal establishes the law of the case to be followed on the second.").

Thus, to the extent that Richmond seeks to challenge his conviction on grounds that were available to him when he filed his first petition, we agree that he is barred from doing so now:

> The relief obtained on the first petition went only to the sentence. The incentive remained, therefore,

> for Richmond to appeal the rejection of his challenges to the *underlying conviction*, since if he were to prevail on appeal on these claims, he could not be resentenced. The district court could properly decline to reconsider these underlying-conviction claims when raised in a second petition.

Richmond, 774 F.2d at 960 (emphasis in original). Whether termed abuse of the writ of res judicata, the reassertion of such claims is not permisible at this stage.

Richmond, however, has focused his attention in the current appeal on challenging the re-imposition of his sentence. This he certainly may do, and in so doing, he may challenge the death penalty on grounds that were available to him but that he did not raise when contesting his first sentence:

> Previously unadjudicated claims must be decided on the merits unless the petitioner has made a conscious decision deliberately to withhold them, is pursuing "needless piecemeal litigation," or has raised the claims only to "vex, harass, or delay." None of these three situations applies to Richmond's petition.

Id. at 961 (citing *Sanders v. United States*, 373 U.S. 1, 18, 83 S.Ct. 1068, 1078, 10 L.Ed.2d 148 (1963)). Richmond may also renew challenges to the death penalty that were raised in his first petition and *decided against him* by the district court:

> [W]hen the district court enjoined Richmond's [initial] death sentence, it relied solely on the [original] Arizona statute's failure to consider mitigating factors of an individual's character. *Richmond v. Cardwell*, 450 F.Supp. at 526. Because Richmond had obtained the sentencing relief he sought, he had no incentive to appeal the adverse determination of his other grounds for challenging the death sentence, and perhaps would not have been permitted to do so on mootness or ripeness grounds. The ends of justice would not be served by denying Richmond appellate consideration of these other constitutional challenges to the death penalty merely because he obtained relief on a different ground.

Id. at 960. With respect to any of the proffered challenges to his sentence, therefore, "Richmond's petition does not constitute an abuse of the writ." *Id.* at 961.

IV

A

At the time of Richmond's conviction in 1974, Arizona law defined first-degree murder in relevant part as follows: "A murder which is perpetrated by . . . any . . . kind of wilful, deliberate and premeditated killing, or which is committed . . . in the perpetration of, or attempt to perpetrate . . . robbery . . . is murder of the first degree." Ariz.Rev.Stat.Ann. § 13-452 (repealed 1978) (current version at § 13-1105). For those convicted of first-degree murder, the Arizona code provides a sentencing hearing independent of the trial. § 13-703 (B). Here, the trial judge must choose without the assistance of a jury between the options of life imprisonment and capital punishment. § 13-703(A)-(B). For purposes of this determination, a special verdict is required regarding the existence or non-existence of any aggravating or mitigating factors. § 13-703(D). The statute puts the burden of establishing the existence of any aggravating factors on the prosecution and the burden of establishing the existence of any mitigating factors on the defense. § 13-703(C). The statute then channels the court's discretion:

> [T]he court . . . shall impose a sentence of death if the court finds *one or more* of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

§ 13-703(E) (emphasis added).

Subsection F enumerates ten aggravating circumstances, including the following three:

> (1) The defendant was previously convicted of a felony in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.
>
> (2) The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.
>
> • • • •
>
> (6) The defendant committed the offense in an especially heinous, cruel or depraved manner.

§ 13-703(F). By the time of Richmond's resentencing in 1980, subsection G of the statute had been revised to read as follows:

> Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any circumstances of the offense, including but not limited to [(1) the defendant's incapacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law, (2) the defendant's suffering of unusual or substantial duress, (3) the defendant's relatively minor participation in the crime, (4) the defendant's reasonable inability to foresee that his conduct would cause or would create the grave risk of causing death, and (5) the defendant's age].

§ 13-703(G).

B

Richmond challenges the constitutionality of this revised sentencing scheme on four grounds. First, he contends that judicial determination of the existence or non-

existence of aggravating circumstances impermissibly usurps the jury's fact-finding function. Second, he claims that requiring the defense to establish the existence of any mitigating circumstances illegitimately shifts the burden of proof. Third, he argues that the Arizona statute creates an unconstitutional presumption that death is the proper sentence. Finally, he insists that imposing the death penalty upon finding that the killing was "especially heinous, cruel or depraved" is unconstitutionally vague.

The Supreme Court's recent decision in *Watson v. Arizona* specifically addressed and rejected the first three contentions, and Richmond has not forcefully advanced these arguments since.[5] With respect to the judicial determination of sentencing factors, the Court stated: "'Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court.'" *Walton*, 110 S.Ct. at 3054 (quoting *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 1446, 108 L.Ed.2d 725 (1990)). Indeed, even before *Walton*, it was well settled that "'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.'" *Id.* (quoting *Hildwin v. Florida*, 490 U.S. 638, 640, 109 S.Ct. 2055, 2057, 104 L.Ed.2d 728 (1989)); *see generally id.* 110 S.Ct. at 3054-55 (Part II of the opinion). As the district

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[5] We have already had occasion to note *Walton*'s rejection of the first and third contentions. *See Smith v. McCormick*, 914 F.2d 1153, 1169-70 (9th Cir.1990). We also note in passing that Richmond's able and experienced counsel, Timothy K. Ford, is intimately familiar with the *Walton* case. Mr. Ford represented Jeffrey Alan Walton in his petition before the United States Supreme Court. This fact—in addition to the cases' underlying similarity—may help to explain why several of the arguments raised here are identical to arguments decided by the Court in that case. *See infra* note 7 (noting the factual similarities between the two cases).

court noted when it rejected this argument in Richmond's first petition:

> "[The Supreme Court] has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."

Richmond, 450 F.Supp. at 523 (quoting *Proffitt v. Florida*, 428 U.S. 242, 252, 96 S.Ct. 2960, 2966, 49 L.Ed.2d 913 (1976)).[6]

The *Walton* Court likewise rejected the contention that requiring the defendant to establish the existence of mitigating factors impermissibly shifts the burden of proof. Denying that the practice violates the eighth and fourteenth amendments, the Court ruled:

> So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating

[6] Since the *Walton* decision, Richmond has apparently conceded that the sixth amendment does not require jury factfinding at the sentencing phase in capital punishment cases, but he has stressed the alternative argument that the equal protection clause *does* require jury fact-finding at sentencing. Because Arizona law provides for jury factfinding in many similar circumstances, Richmond contends, it is arbitrary and irrational not to provide for it here. We find this argument unpersuasive. As the Supreme Court noted in *Proffitt*, there is indeed a rational reason for committing the fact-finding function to the judge at the sentencing phase in capital punishment cases, and it probably promotes more evenhanded justice to do so. *See Proffitt*, 428 U.S. at 252, 96 S.Ct. at 2966. Moreover, the Court's sixth amendment holding on this issue in *Walton* would make little sense if the broader, less specific terms of the equal protection clause could be read to require the opposite result.

> circumstances sufficiently substantial to call for leniency.

Walton, 110 S.Ct. at 3055; *see generally id.* at 3055-56 (Part III of the opinion).

Finally, the *Walton* Court also rejected the claim that the Arizona statute creates an impermissible presumption that death is the proper sentence for first-degree murder. Like Richmond, Walton had challenged the statute's directive that a court "*shall* impose a sentence of death" if it finds one or more aggravating circumstances and no substantial mitigating circumstances. Ariz.Rev. Stat.Ann. § 13-703(E) (emphasis added). Walton had contended, as Richmond does here, that this provision violates the proscription against mandatory death sentences announced in *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). The Court disagreed, citing its recent decisions in *Blystone v. Pennsylvania*, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990), and *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316, *reh'g denied*, —— U.S. ——, 110 S.Ct. 1961, 109 L.Ed.2d 322 (1990), both of which had upheld similarly worded capital punishment laws. The Court ruled that so long as the statute provides individualized sentencing and does not automatically impose death for certain categories of murder, it passes constitutional muster under *Woodson*. *See generally Walton*, 110 S.Ct. at 3056 (Part IV of the opinion).

In short, the Supreme Court has specifically rejected three of the constitutional arguments raised here, and it has done so in the context of reviewing the very same statute.

C

Richmond insists, however, that his fourth constitutional challenge to the statute survives *Walton*. Indeed, he contends that *Walton* itself renders his death sentence unconstitutional and that this court's en banc decision in *Adamson v. Ricketts* mandates resentencing. *See Adam-*

son, 865 F.2d 1011 (9th Cir. 1988) (en banc), *cert. denied sub nom. Lewis v. Adamson*, —— U.S. ——, 110 S.Ct. 3287, 111 L.Ed.2d 795 (1990). We are not persuaded.

In *Walton*, another Arizona inmate who was convicted of first-degree murder and sentenced to death challenged his sentence on constitutional grounds.[7] The Supreme Court denied all four of his claims and affirmed the sentence. Despite this result, Richmond contends that Walton's fourth claim and the Court's disposition of that claim bolster his petition.[8]

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[7] The facts of the *Walton* case are strikingly similar in many respects to the facts of the present case. Walton, who also acted with the assistance of two friends, "went to a bar in Tucson, Arizona, . . . intending to find and rob someone at random, steal his car, tie him up, and leave him in the desert. . . . In the bar's parking lot, the trio encountered Thomas Powell, a young, off-duty Marine." 110 S.Ct. at 3052. Forcing Powell to accompany them, the three commandeered his car and drove to a remote area on the outskirts of town. When they stopped, they

> forced Powell out of the car and had him lie face down on the ground near the car while they debated what to do with him. . . . Walton then took a .22 caliber derringer and marched Powell off into the desert. After walking a short distance, Walton forced Powell to lie down on the ground, placed his foot on Powell's neck, and shot Powell once in the head. Walton later told [his two accompanying friends] that he had shot Powell and that he had "never seen a man pee in his pants before."

Id. Despite the similarities, the circumstances of Powell's death were somewhat more gruesome than those of Crummett's:

> Powell's body was found approximately a week later. . . . A medical examiner determined that Powell had been blinded and rendered unconscious by the shot but was not immediately killed. Instead, Powell regained consciousness, apparently floundered about in the desert, and ultimately died from dehydration, starvation, and pneumonia approximately a day before his body was found.

Id.

[8] Walton's first three claims, which were also raised by Richmond, were the three claims discussed in Part IV-B above. First, Walton alleged that "every finding of fact underlying the sentencing decision must be made by a jury, not by a judge." 110 S.Ct. at 3054; *compare* Ariz.Rev.Stat.Ann. § 13-703(B). Second, he alleged that the Arizona statute unconstitutionally "imposes on defendants the burden of establishing, by a preponderance of the evidence, the existence of mitigating circumstances." 110 S.Ct. at 3055; *compare* Ariz.Rev.Stat.Ann. § 13-703(C). Third, he alleged that the Arizona statute "creates an unconstitutional presumption that death is the proper sentence" because it *requires* the death penalty "if one or more aggravating circumstances are found and mitigating circumstances are held insufficient to call for leniency." 110 S.Ct. at 3056; *compare* Ariz.Rev.Stat.Ann. § 13-703(E). The Supreme Court rejected all three of these claims as well as the fourth, which is discussed herein.

In his fourth claim, Walton alleged that the aggravating circumstance found and relied upon by the sentencing judge—his commission of the crime "in an especially heinous, cruel or depraved manner"—was unconstitutionally vague. Ariz. Rev.Stat.Ann. § 13-703(F)(6); *see* 110 S.Ct. at 3056-57. The Supreme Court agreed that the relevant statutory provision was vague but did not agree that it was unconstitutional. In essence, the Court held that facial vagueness alone does not decide the question: one must look beyond the language of the suspect provision and consider the full circumstances attending its application. Safeguards built into the sentencing scheme through other provisions—and even extra-statutory procedural safeguards—may preserve the scheme's constitutional integrity. *See generally Walton*, 110 S.Ct. at 3056-58 (Part V of the opinion).

The Court found three such safeguards within Arizona law. First, the Arizona scheme provides for sentencing by a judge, not by a jury. That fact alone distinguished *Walton* from *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), and *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), two cases relied upon by Walton in which the Supreme Court had invalidated death sentences due to similarly vague statutory definitions of aggravating circumstances.

Where a judge makes the sentencing findings there is less danger of impermissibly broad applications of statutory terms: "Trial judges are presumed to know the law and to apply it [correctly] in making their decisions." *Walton*, 110 S.Ct. at 3057.

Second, the Court found, the Arizona Supreme Court had effectively salvaged the suspect provision by affording it a "limiting definition" in the course of reviewing the trial judge's sentencing decision. What the state legislature had improvidently left out, the state supreme court properly inserted:

> The Arizona Supreme Court stated that "a crime is committed in an especially cruel manner when the perpetrator inflicts mental anguish or physical abuse before the victim's death," and that "[m]ental anguish includes a victim's uncertainty as to his ultimate fate." . . .
>
> * * * *
>
> Recognizing that the proper degree of definition of an agravating factor is not susceptible of mathematical precision, we conclude that the definition given to the "especially cruel" provision *by the Arizona Supreme Court* is constitutionally sufficient because it gives meaningful guidance to the sentencer.

Id. at 3057-58 (quoting *State v. Walton*, 159 Ariz. 571, 586, 769 P.2d 1017, 1032 (1989)) (emphasis added). By injecting this limiting definition into a sentencing process already restricted to judges, Arizona provided ample protection for Walton's constitutional rights.

> If the Arizona Supreme Court has narrowed the definition of the "especially heinous, cruel or depraved" aggravating circumstance, we presume that Arizona trial judges are applying the narrower definition. It is *irrelevant* that the statute itself may not narrow the construction of the factor.

Id. at 3057 (emphasis added).

Third, the Court reasoned:

> [E]ven if a trial judge fails to apply the narrowing construction or applies an improper construction, the Constitution does not necessarily require that a state appellate court vacate a death sentence based on that factor. Rather, as we held in *Clemons v. Mississippi*, 494 U.S. [738], 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), a state appellate court may itself determine whether the evidence supports the existence of the aggravating circumstance as properly defined or the court may eliminate consideration of the factor altogether and determine whether any remaining aggravating circumstances are sufficient to warrant the death penalty.

Id.

In his reliance on *Walton*, Richmond points out as an initial matter that the same aggravating circumstance at issue in that case was cited by the Arizona Supreme Court in its review of his death sentence. Richmond insists that the terms of this aggravating circumstance—"especially heinous, cruel or depraved"—are facially vague. He is undeniably correct; *Walton* held so explicitly. Richmond then argues, however, that whereas the Arizona Supreme Court cured this potential defect in *Walton*, it failed to do so in his case. The court, he maintains, applied no comparable "limiting construction" in its review of his sentence. This contention is empirically incorrect.

In reviewing Richmond's sentence, the Arizona Supreme Court quite clearly *did* provide a limiting construction for the admittedly vague aggravating circumstance. In fact, if anything, the state court provided a more narrowly tailored and more obviously sufficient limiting construction in Richmond's case than it did in Walton's:

> "Cruel" has been defined as "disposed to inflict pain especially in a wanton, insensate or vindictive man-

ner: sadistic." *State v. Knapp*, 114 Ariz. 531, 543, 562 P.2d 704 (1977), *cert. denied*, 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978). Cruelty involves the victim's pain or suffering before death. *State v. Gretzler*, [135 Ariz. 42, 659 P.2d 1 (1983)]; *State v. Poland*, 132 Ariz. 269, 645 P.2d 784 (1982); *State v. Lujan*, 124 Ariz. 365, 604 P.2d 629 (1979). The offense must be committed in an *especially* cruel, heinous or depraved manner to be considered an aggravating circumstance. *State v. Lujan*, *supra*. . . .

"Heinous" has been defined as "hatefully or shockingly evil; grossly bad," and "depraved" is marked by debasement, corruption, perversion or deterioration." *State v. Knapp*, *supra*. Heinous and depraved involve the mental state and attitude of the offender as reflected in his words and actions. *State v. Gretzler*, *supra*; *State v. Poland*, *supra*; *State v. Lujan*, *supra*. In *Gretzler*, *supra*, we discussed factors which lead to a finding of heinousness or depravity. One factor is the infliction of gratuitous violence on the victim; another related factor is the needless mutilation of the victim. Here the victim was already unconscious and bleeding when he was run over not once, but twice, each time from a different direction. The evidence indicates that the first run by the vehicle was over the victim's head crushing his skull and killing him. The second run of the vehicle was over the body of the victim. The investigating officers found, at the location of the murder, two large pools of blood separated by about 30 feet, which was consistent with the body having been run over and dragged to where it was found. . . .

. . . We believe the facts of this case set it "apart from the normal first degree murders." *State v. Brookover*, 124 Ariz. 38, 601 P.2d 1322 (1979).

Richmond, 136 Ariz. 312, 319, 666 P.2d 57, 64 (plurality opinion) (finding Crummett's killing especially heinous and depraved but not especially cruel);[9] *compare id. with Walton*, 159 Ariz. at 586-88, 769 P.2d at 1032-34.

As in *Walton*, the sentence in this case was (a) imposed by a trial judge presumably knowledgeable in the law, (b) thoroughly and independently reviewed by the Arizona Supreme Court, and (c) reimposed under a sufficiently limiting construction.[10] Under a fair reading of *Walton* and the record alone, therefore, Richmond's contentions must fail.

Richmond attempts to avoid this conclusion by challenging the legal accuracy of the Arizona Supreme Court's limiting construction. He cites several state court de-

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[9] Richmond argues that only two of the five Justices of the Arizona Supreme Court concurred in this portion of the court's opinion. He is correct. Two other Justices voted to affirm the sentence but on other grounds. They explicitly rejected the argument that the killing had been especially heinous and depraved. *See Richmond*, 136 Ariz. at 322-24, 666 P.2d at 67-69 (Cameron, J., concurring and Gordon, V.C.J., joining). The fifth Justice dissented altogether. *See* 136 Ariz. at 324-26, 666 P.2d at 69-71 (Feldman, J., dissenting). The fact that a majority of the court did not concur in this finding, however, does not deny that the Justices who did concur in it provided an adequate limiting construction. The relevant point is that members of the court who premised their votes on the challenged factor undertook the deliberations and analysis constitutionally required.

More importantly, Richmond's observation is irrelevant in light of the fact that *four* Justices concurred in the finding of two other aggravating circumstances, either one of which could constitutionally have justified imposition of the death penalty. *See infra* Part IV-D.

[10] *See Richmond*, 136 Ariz. at 317, 666 P.2d at 62 ("[I]n each case where the death penalty is imposed, this court conducts an independent review of the record to assure a just result. We have reviewed the record in the instant case . . ."); 136 Ariz. at 320, 666 P.2d at 65 ("In death penalty cases, this court will conduct an independent examination of the record to determine for ourselves the presence or absence of aggravating and mitigating circumstances and the weight to give to each. We also independently determine the propriety of the sentence.").

cisions, most notably *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983), for the proposition that the court applied a definition of the aggravating circumstance that is untenable under Arizona law. This court, however, is foreclosed from engaging in any such inquiry. A federal appellate court cannot challenge the Arizona Supreme Court on matters of Arizona law; in that realm, the authority of the state court remains supreme.

Both *Walton* and its companion case, *Lewis v. Jeffers*, —— U.S. ——, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990), support this analysis. As *Walton* pointed out, the relevant focus for this court's attention is not upon the language of the Arizona statute per se or even upon the sentencing decision of the state trial judge; rather, it is upon the constitutional legitimacy of Richmond's sentence as that sentence stands *today* after review by and exhaustion of the state court process. *See Walton*, 110 S.Ct. at 3057-58. The only question for this court is whether the *final* state result violates constitutional law so as to warrant granting a writ of habeas corpus. *Walton* requires this court to pay due deference to state judicial systems in the administration of their own criminal sanctions and to recognize both the competence and duty of state courts of general jurisdiction to enforce federal constitutional law.

Jeffers thoroughly reinforces the *Walton* rule. In *Jeffers*, the Supreme Court restated and reapplied the *Walton* holding to deny another Arizona prisoner's challenge to the legitimacy of his death sentence. Because *Jeffers* was before the Court on collateral review, the Court concluded that even greater deference was owed to the state system than the Court had urged in *Walton*, which it had heard on direct review. The Court never reached the merits of Jeffers's constitutional claims, and it certainly never approached any questions of state law; rather, the Court reached its decision upon formulation of the appropriate standard of review. Writing for the Court, Justice O'Connor explained:

> [R]espect for a state court's findings of fact and application of its own law counsels against the sort of *de novo* review undertaken by the Court of Appeals in this case. . . . Where the issue is solely whether a state court has properly found existence of a constitutionally narrowed aggravating circumstance, we have never required federal courts "to peer majestically over the [state] court's shoulder so that [they] might second-guess its interpretation of facts that quite reasonably—perhaps even quite plainly—fit within the statutory language."...
>
> Rather, in determining whether a state court's application of its constitutionally adequate aggravating circumstance was so erroneous as to raise an independent due process or Eighth Amendment violation, we think the more appropriate standard of review is the "rational factfinder" standard established in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We held in *Jackson* that where a federal habeas corpus claimant alleges that his state conviction is unsupported by the evidence, federal courts must determine . . . "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Jeffers, 110 S.Ct. at 3102-03 (quoting *Godfrey v. Georgia*, 446 U.S. 420, 450, 100 S.Ct. 1759, 1776, 64 L.Ed.2d 398 (1980) (White, J., dissenting) and *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, *reh'g denied*, 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed.2d 126 (1979)) (emphasis in original).

In short, this court's focus must not be on the underlying sentence but on whether the *state system* in both imposing and reviewing that sentence committed an *independent* constitutional violation. To vacate Richmond's sentence, this court would have to find that there is no

rational basis in law or fact for the state supreme court's final evaluation that the circumstances warrant the sentence of death:

> [A] federal court should adhere to the *Jackson* standard even when reviewing the decision of a state appellate court that has independently reviewed the evidence, for the underlying question remains the same: if a State's aggravating circumstances adequately perform their constitutional function, then the state court's application of those circumstances raises, apart from due process and eighth amendment concerns, only a question of the proper application of state law. A state court's finding of an aggravating circumstance in a particular case—*including a de novo finding by an appellate court that a particular offense "is especially heinous . . . or depraved"*—is arbitrary or capricious if and only if no reasonable sentencer could have so concluded.

Id. 110 S.Ct. at 3103 (emphasis added).

We therefore reject Richmond's invitation to "conduct[] a *de novo*, case-by-case comparison of the facts" of various state court precedents. *Id.* at 3101. Like the Supreme Court in *Walton*, we "conclude that the definition given to the 'especially cruel' provision by the Arizona Supreme Court is constitutionally sufficient." *Walton*, 110 S.Ct. at 3058. Applying *Jeffers*, we further conclude that under that definition a rational factfinder could indeed have found Crummett's murder heinous or depraved so as to warrant the penalty of death.

D

Even if Richmond were to prevail in his claim that the Arizona Supreme Court failed to provide a sufficiently limiting construction for the aggravating circumstance discussed above, however, his contentions would still lack merit. The Arizona Supreme Court rested its affirmance

of his sentence upon a finding of not one, but three aggravating circumstances and an insufficient showing of mitigating circumstances. *See Richmond*, 136 Ariz. at 318-21, 666 P.2d at 63-66. The second aggravating factor relied upon was Richmond's conviction for another murder six months after his initial conviction. Although this latter conviction postdated Richmond's first, "[i]t is not disputed that the killing that was the basis of th[at] conviction occurred prior to the murder of Bernard Crummett." *Richmond*, 640 F.Supp. at 780; *see supra* note 1. In any event, both convictions were duly on record by the time of Richmond's resentencing in 1980.

Furthermore, although the state supreme court explicitly found and addressed only these two aggravating circumstances, it held that "[t]he trial court correctly found three aggravating circumstances." *Richmond*, 136 Ariz. at 320, 666 P.2d at 65. The third was an entirely separate prior conviction for kidnapping—statutorily relevant for death penalty purposes as an offense "involving the use or threat of violence on another person." Ariz.Rev.Stat. Ann. § 13-703(F)(2).[11] Arizona law explicitly provides that a single aggravating circumstance may suffice for imposition of the death penalty. *See* § 13-703(E).

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[11] The court also hinted at the possible applicability of a fourth aggravating circumstance: the defendant's commission of the crime in expectation of pecuniary gain. *See* Ariz.Rev.Stat.Ann. § 13-703(F)(5); *Richmond*, 136 Ariz. at 320, 666 P.2d at 65. Although noting that the trial court had improperly analyzed this factor in reaching the conclusion that it did not apply, the Arizona Supreme Court declined to determine whether under a proper analysis it would apply.

With respect to consideration of Richmond's kidnapping conviction, the Arizona Supreme Court's majority opinion does not address it except to express general agreement with the trial court's reliance upon it. The concurrence, which was endorsed by two Justices, is somewhat more explicit in its embrace of the lower court's reliance on both the prior murder conviction *and* the prior kidnapping conviction. *See Richmond*, 136 Ariz. at 323-24, 666 P.2d at 68-69 (Cameron, J., concurring and Gordon, V.C.J., joining).

Richmond does not contend, nor could he reasonably, that the statutory definitions of these two other factors are unconstitutionally vague. *See* § 13-703(F)(1)-(2). Rather, he sidesteps consideration of these additional factors by citing this circuit's en banc decision in *Adamson v. Ricketts* for the proposition that invalidation of any one aggravating circumstance requires resentencing. *See* 865 F.2d at 1037 n.42, 1038, 1039. We have just held that the aggravating circumstance to which Richmond refers is *not* invalid, but assuming for the sake of argument that it is, Richmond's reliance on *Adamson* is not well taken.

The Supreme Court granted certiorari in *Walton* specifically *because* of this circuit's en banc holding in *Adamson*,[12] and *Walton* reached the opposite conclusion regarding the Arizona statute's constitutionality. Even if the portion of *Adamson* upon which Richmond relies survives *Walton*, it still does not support his claim. Contrary to the suggestion, *Adamson* did not hold that invalidation of one aggravating circumstance automatically requires remand for resentencing; rather, the court simply noted that it is the common practice of the Arizona Supreme Court to remand for resentencing when *that court* invalidates an aggravating circumstance. *Id.* There is no suggestion in *Adamson* that the United States Constitution requires remand when one aggravating factor is eliminated from the analysis if sufficient other aggravating factors remain.

The Supreme Court's recent decision in *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d

[12] *See Walton*, 110 S.Ct. at 3054 ("Because the United States Court of Appeals for the Ninth Circuit has held the Arizona death penalty statute to be unconstitutional for the reasons submitted by Walton in this case, *see Adamson v. Ricketts*, 865 F.2d 1011 (1988) (en banc), we granted certiorari."); *id.* 110 S.Ct. at 3059 (Scalia, J., concurring) (describing *Adamson* and *Walton* as "essentially identially" cases).

725 (1990), upon which Richmond also relies, is not to the contrary. In *Clemons*, a Mississippi inmate challenged the constitutionality of a death sentence imposed partially on the basis of a court's finding that it had been an "especially heinous, atrocious or cruel" killing. *Id.* 110 S.Ct. at 1445. The Mississippi law in question permitted imposition of the death penalty upon a finding of only one aggravating circumstance so long as that aggravating circumstance outweighed all mitigating circumstances. Finding the state supreme court's consideration of the "especially heinous" factor impermissibly vague, the Supreme Court remanded for resentencing.

The Court did not hold, however, that imposition of the death penalty on the basis of the single remaining aggravating factor would have been ipso facto unconstitutional. Rather, it implicitly recognized that reliance on a single aggravating factor *can* be constitutional. *See id.* at 1446, 1450-51. The Court remanded because once the factor was removed from the analysis, it was unclear from the Mississippi Supreme Court's opinion whether the one remaining circumstance still outweighed all the mitigating evidence. *See id.* at 1449-51 (Parts III-IV of the opinion).

In this case, there is no similar doubt. Elimination of the challenged factor would still leave enough support for Richmond's sentence because the statute at issue here is fundamentally different from the statute at issue in *Clemons*. The Mississippi law that *Clemons* considered authorizes the death penalty if "'there are insufficient mitigating circumstances . . . to *outweigh* the aggravating circumstances.'" *Id.* at 1446 n.2 (quoting Miss. Code Ann. § 99-19-101(3)(c) (Supp.1989)) (emphasis added). Arizona's law mandates the death penalty "if the court *finds one or more* of the [enumerated] aggravating circumstances . . . *and* that there are no mitigating circumstances *sufficiently substantial to call for leniency*." Ariz.

Rev.Stat. Ann. § 13-703(E) (emphasis added). The difference is significant: a conclusion by the Arizona courts that there are no substantial mitigating circumstances is separate from and independent of any conclusion regarding the existence of aggravating circumstances. Invalidation of an aggravating circumstance does not mandate reweighing or require resentencing where the court has found that the prosecution has met its burden of establishing aggravation sufficient to warrant the state's harshest penalty *two or three times* and that the defense has failed to establish mitigating circumstances sufficiently substantial to call for leniency. *See id.* §§ 13-703(C), (E). Under the statute at issue in *Clemons*, the invalidation of an aggravating circumstance necessarily renders any evidence of mitigation "weightier" or more substantial in a relative sense; the same, however, cannot be said under the terms of the Arizona statute at issue here. Nothing in the Arizona statute suggests the need for plenary reweighing where the record still reveals that there are "one or more of the [enumerated] aggravating circumstances . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency." *Id.* § 13-703(E).

V

Richmond next contends that because the trial court never specifically found that he caused, intended to cause, or attempted to cause Crummett's death, imposition of the death penalty would violate the rule of *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). The defendant in *Enmund* had been convicted of felony murder and sentenced to death for his involvement in the killing of two robbery victims, even though the record only suggested that he was the driver of the get-away car. In vacating Enmund's sentence, the Supreme Court held that imposition of the death penalty violates the eighth and fourteenth amendments in the absence of a specific finding by the trier of fact that the defendant

actually killed, attempted to kill, intended to kill, or contemplated that life would be taken:

> Enmund himself did not kill or attempt to kill; and, as construed by the Florida Supreme Court, the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder. Yet under Florida law death was an authorized penalty because Enmund aided and abetted a robbery in the course of which murder was committed.

Id. at 798, 102 S.Ct. at 3377; *see id.* at 801, 102 S.Ct. at 3378.

Enmund, however, is clearly distinguishable from the present case. The jury that convicted Richmond received instructions on both premeditated and felony murder, and the record before us clearly provides sufficient evidence for a finding that Richmond expressly intended to participate in and to facilitate that murder. Moreover, the Supreme Court's holding in *Enmund* was predicated upon the attenuated nature of the defendant's responsibility for the deaths in that case. As the Supreme Court pointed out more recently in *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127, *reh'g denied*, 482 U.S. 921, 107 S.Ct. 3201, 96 L.Ed.2d 688 (1987), *Enmund* does not stand for the blanket proposition that capital punishment is unconstitutional in cases of felony murder:

> [S]ome nonintentional murderers may be among the most dangerous and inhumane of all—the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill."

> . . . [W]e hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.
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> * * * *
>
> . . . [W]e simply hold that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement.

481 U.S. at 157-58, 107 S.Ct. at 1687-88 (footnote omitted).

Furthermore, in its independent review of the record in this case, the Arizona Supreme Court explicitly did consider *Enmund*, and it set forth findings sufficient to satisfy both that test and the Supreme Court's later pronouncements in *Tison:*

> Even if we accept appellant's contention that he was not driving the car when the victim was run over, we do not believe this case falls within the parameters of *Enmund.* The facts from the appellant's version indicate that he was the leader of the group; he was the first to use violent force on the victim; he was aware that the victim, if allowed to live, could identify him. Appellant, from his version of the facts, was willing to leave the wounded and unconscious victim alone in the desert to an uncertain fate. . . . There is no evidence that appellant protested or showed any emotion when the victim was twice run over. The appellant's version of the facts indicates appellant played an integral part in the events which caused the victim's death, and he willingly assisted in the acts which were intended to cause the victim's death.

> The evidence presented by the state was that the appellant drove the vehicle over the victim, thus killing him. The testimony of Faith Erwin was that the appellant was the driver at the time the victim was run over. The circumstantial evidence supports Faith's testimony.

Richmond, 136 Ariz. at 318, 666 P.2d at 63.[13]

Nor does it matter that the *Enmund* finding was made by the state supreme court rather than by the original sentencing court:

> At what precise point in its criminal process a State chooses to make the *Enmund* determination is of little concern from the standpoint of the Constitution. . . .
>
> . . . [W]hen a federal habeas court reviews a claim that the death penalty has been imposed on one who has neither killed, attempted to kill, nor intended that a killing take place or lethal force be used, the court's inquiry cannot be limited to an examination of jury instructions. Rather, the court must examine the entire course of the state-court proceedings against the defendant in order to determine whether, at some point in the process, the requisite factual finding as to the defendant's culpability has been made.

Cabana v. Bullock, 474 U.S. 376, 386-87, 106 S.Ct. 689, 696-97, 88 L.Ed.2d 704 (1986) (footnote omitted). Accordingly, we conclude that the Arizona courts have predicated Richmond's sentence upon a sufficent finding of criminal intent.

VI

As a black male of moderate means, Richmond next contends that the district court erred in denying his request for an evidentiary hearing upon his claim that Ari-

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[13] Interestingly, the Arizona Supreme Court conducted its *Enmund* analysis in this case before the United States Supreme Court narrowed the *Enmund* holding in *Tison.* The United States Supreme Court decided *Enmund* in 1982; the Arizona Supreme Court affirmed Richmond's sentence in 1983; and the United States Supreme Court decided *Tison* in 1987.

zona's administration of the death penalty is racially, sexually, and socio-economically discriminatory. We disagree. A habeas corpus petitioner is entitled to an evidentiary hearing both if he "alleges facts which, if proved, would entitle him to relief" and if he did not receive a full and fair evidentiary hearing on the issue in the state court. *Townsend v. Sain*, 372 U.S. 293, 312, 83 S.Ct. 745, 756, 9 L.Ed.2d 770 (1963); *see id.* at 312-19, 83 S.Ct. at 756-60. The facts that Richmond has alleged, even if proven, would not entitle him to relief.

In support of his request for a hearing on this issue in the district court, Richmond made an extensive proffer of what he seeks to prove:

> The proffer included that, although 15% of the victims of homicides in Arizona since 1973 have been black, every person under death sentence was convicted of killing a white victim; that [although] approximately 10% of the persons convicted of homicide in Arizona since 1973 have been women, no women are on death row. All three experts who had examined the Arizona death sentencing process from 1973 to the present [March 1987] found significant discrepancies based on the victim's race; two found evidence of discrimination based on the defendant's race, and one demonstrated significant disparities based on sex and economic status as well.

Brief for Appellant at 38-39 (citations omitted). This proffered evidence, however, is precisely the sort of generalized statistical evidence that was rejected as unactionable by the Supreme Court in *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262, *reh'g denied*, 482 U.S. 920, 107 S.Ct. 3199, 96 L.Ed.2d 686 (1987). Even if proven, the statistical disparities to which Richmond points would be insufficient to support an inference of purposeful discrimination in his own case. To require the district court to weigh this evidence would be to suggest that Richmond's death sentence could conceivably be

invalidated solely on the basis of his physical or social affinity to other defendants who are not now before this court but who may have suffered unconstitutional discrimination in their receipt of the same sentence. This we cannot do. To prevail in challenging his sentence under the equal protection clause, Richmond "must prove that the decisionmakers in *his* case acted with discriminatory purpose." *McCleskey*, 481 U.S. at 292, 107 S.Ct. at 1767 (emphasis in original). Richmond has alleged no facts to suggest that either the Arizona Supreme Court, the state trial court, or the prosecutor's office acted with prejudicial or discriminatory purpose in either seeking or imposing his sentence. The district court thus properly denied his request for an evidentiary hearing on this issue. *See generally id.* at 292-320, 107 S.Ct. at 1766-82.

VII

Richmond's final contention is that fulfillment of his sentence after sixteen years on death row would constitute cruel and unusual punishment in violation of the eighth and fourteenth amendments.[14] We know of no decision by either the United States Supreme Court or this circuit that has held that the accumulation of time a defendant spends on death row during the prosecution of his appeals can accrue into an independent constitutional violation, and Richmond has cited no such decision.

On the other hand, the State of Arizona has directed the court's attention to two relevant, though not controlling, precedents. In a decision affirmed two years later by

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[14] Richmond actually alleged that fulfillment of his sentence after *thirteen* years on death row would constitute cruel and unusual punishment. Because he raised that claim in his opening brief, which was filed in 1987, we have added the past three years during which we deferred submission of his appeal. We note, however, that because this appeal properly concerns Richmond's sentence only as of the date of its reimposition in 1980, the relevant period of his residency on death row is actually ten years.

the Tenth Circuit, the United States District Court for the District of Utah rejected a similar claim brought by a habeas corpus petitioner who had been on death row for ten years. *Andrews v. Shulsen*, 600 F.Supp. 408, 431 (D.Utah 1984), *aff'd*, 802 F.2d 1256 (10th Cir.1986), *cert. denied*, 485 U.S. 919, 108 S.Ct. 1091, 99 L.Ed.2d 253, *reh'g denied*, 485 U.S. 1015, 108 S.Ct. 1491, 99 L.Ed.2d 718 (1988). The court reasoned that to accept the petitioner's argument would be "a mockery of justice" given that the delay was attributable more to the petitioner's actions than to the state's. *Id.* Like Richmond, the petitioner in *Andrews* had sought "extensive and repeated review of [his] death sentence." *Id.* Arizona also points to the well-known decision of the California Supreme Court in *People v. Chessman*, in which that court rejected the same claim by an eleven-year death-row inmate. 52 Cal.2d 467, 497, 341 P.2d 679, 699 (1959), *cert. denied*, 361 U.S. 925, 80 S.Ct. 296, 4 L.Ed.2d 241, *reh'g denied*, 361 U.S. 941, 80 S.Ct. 383, 4 L.Ed.2d 362 (1960). Finally, we note the decision of the United States Supreme Court in *Harrison v. United States*, 392 U.S. 219, 221 n. 4, 88 S.Ct. 2008, 2009 n. 4, 20 L.Ed.2d 1047 (1968), which the district court cited in its rejection of this claim and which held that an eight-year delay between an arrest and sentencing was not unconstitutional where the delay resulted from the need to assure careful review of an unusually complex case. *See Richmond*, 640 F.Supp. at 803 (citing *Harrison*).

Especially in light of the relative absence of contrary precedents, we believe that the reasoning of these cases is sound. A defendant must not be penalized for pursuing his constitutional rights, but he also should not be able to benefit from the ultimately unsuccessful pursuit of those rights. It would indeed be a mockery of justice if the delay incurred during the prosecution of claims that fail on the merits could itself accrue into a substantive claim to the very relief that had been sought and properly denied in the first place. If that were the law, death-row

inmates would be able to avoid their sentences simply by delaying proceedings beyond some threshold amount of time, while other death-row inmates—less successful in their attempts to delay—would be forced to face their sentences. Such differential treatment would be far more "arbitrary and unfair" "cruel and unusual" than the current system of fulfilling sentences when the last in the line of appeals fails on the merits. We thus decline to recognize Richmond's lengthy incarceration on death row during the pendency of his appeals as substantively and independently violative of the Constitution.

VIII

For the foregoing reasons, we affirm the judgment of the district court and deny Richmond's petition for a writ of habeas corpus.

AFFIRMED.

HARRY PREGERSON, Circuit Judge, with whom Judges HUG, NORRIS and REINHARDT join, dissenting from denial of rehearing en banc:

By declining to rehear this case en banc, this court sends a man to this death without undertaking even the minimal review that the Supreme Court continues to find appropriate in habeas cases. In this case, even the most deferential review of the record reveals that no rational sentencer could have concluded that Richmond's mental state was "especially heinous," as that term is defined by the Arizona Supreme Court. The Arizona Supreme Court's conclusion that Richmond's mental state was "especially heinous" turns on the assumption that he was driving the car when it ran over the victim. The identity of the driver, however, was the subject of a credibility dispute. Neither the jury nor the trial court resolved that dispute, and the Arizona Supreme Court is incapable of resolving it rationally.

Moreover, the panel maintains that any error in finding of an aggravating circumstance is harmless because the sentencing judge concluded that the mitigating circumstances were not sufficiently substantial to call for leniency. The panel's conclusion is based on the erroneous premise that Arizona law permitted the sentencing court to arrive at such a conclusion without weighing the aggravating factors against the mitigating circumstances. *See Richmond v. Lewis*, 921 F.2d 933, 947 (9th Cir. 1990). By maintaining that Arizona's statute is not a weighing statute, the panel's opinion directly conflicts with Arizona case law and the prior decisions of this court. That case law demonstrates that in Arizona, the sentencer evaluates whether the mitigating evidence is sufficiently substantial to warrant leniency by weighing it against the aggravating factors. When an invalid aggravating factor is removed from the scales, the equation can change. Someone must reevaluate the mix of mitigating factors in light of the reduced gravity of the remaining valid aggravating factors.

I

The panel's opinion acknowledges that the "especially heinous" aggravating circumstance is unconstitutionally vague on its face, but it concludes that the Arizona Supreme Court applied a sufficiently narrow construction of the facially vague term. Once a state appellate court has articulated a constitutionally sufficient narrowing construction of a facially vague aggravating circumstance, federal courts must still review the state courts' application of that narowed definition to the facts of a particular case. That review is to be conducted under the deferential "rational factfinder" standard of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A state court's finding of an aggravating circumstance, including a state appellate court's finding that a murder is "especially heinous," violates the Constitution if no reasonable sentencer could have made the finding. *See Lewis v. Jeffers*, —— U.S. ——, 110 S.Ct. 3092, 3102-03, 111 L.Ed.2d 606 (1990).

In this case, no rational sentencer could have found that Richmond's mental state was "especially heinous" as that facially vague term has been narrowed by the Arizona Supreme Court. The limiting definition, as reported in the panel's opinion, requires that the sentencer make a factual finding about the defendant's mental state. "Heinous and depraved involve the mental state and attitude of the offender as reflected in his words and actions." *State v. Richmond*, 136 Ariz. 312, 666 P.2d 57, 64 (Ariz.1983), *quoted in Richmond v. Lewis*, 921 F.2d 933, 943 (9th Cir.1990). In addition, the Arizona Supreme Court tells us that "heinous" means "grossly bad" or "shockingly evil." The Arizona Supreme Court applies several factors to determine whether the "especially heinous" aggravating circumstance applies. In determining in this case that Richmond's mental state was grossly bad or shockingly evil, the Arizona Supreme Court mentioned only two of those factors: the infliction of gratuitous violence on the victim and the mutilation of the corpse. I believe that by focusing solely on those two factors in this case, the Arizona Supreme Court could draw rational inferences about the mental state of only one actor: the driver of the car:

> Here the victim was already unconscious and bleeding when he was run over not once, but twice, each time from a different direction. The evidence indicates that the first run by the vehicle was over the victim's head crushing his skull and killing him. The second run of the vehicle was over the body of the victim. The investigating officers found, at the location of the murder, two large pools of blood separated by about 30 feet, which was consistent with the body having been run over and dragged to where it was found.

Id., quoted in *Richmond*, 921 F.2d at 943.

As this quotation demonstrates, the Arizona Supreme Court clearly focused on the actions of the driver when it determined that the facts warranted a finding that the killer's mental state was "especially heinous." The Arizona Supreme Court appeared to assume that Richmond was the driver. Yet neither the jury nor the sentencing court ever found that Richmond was the driver.

Indeed, the driver's identity has been vigorously disputed throughout this case. Faith Erwin provided the only testimony implicating Richmond as the fatal driver.[1] Richmond has always denied being the fatal driver, and he has witnesses to support him. In his statement to the police, Richmond said that Becky Corella backed the car up over the victim, then drove forward and ran over him again. *Richmond v. Ricketts*, 640 F.Supp. 767, 771 (D. Ariz.1986). Corella did not testify.[2] A witness for Richmond testified that Erwin earlier reported that Corella had been driving. 640 F.Supp. at 778. The jury did not determine who drove the car. Because the jury was instructed on felony murder, the jury's verdict is consistent with either version.

At the sentencing hearing, Richmond submitted additional evidence to show that Corella was the lethal driver. 640 F.Supp. at 778-79. According to affidavits signed by two witnesses, Corella admitted being the driver. Moreover, an affidavit signed by the prosecutor in the original trial stated that Corella was prepared to testify "and accept blame for the killing." *Id.*[3]

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[1] Erwin received immunity in return for her testimony. *Richmond v. Ricketts*, 640 F.Supp. 767, 792 n. 30 (D.Ariz.1986).

[2] Corella was granted immunity, but neither the prosecution nor the defense called her as a witness. *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41, 44 (1976).

[3] In discussing the procedural history of the case, the panel's opinion mentions that Richmond filed one of these affidavits in a petition for post-conviction relief. 921 F.2d at 936. It does not discuss the other affidavits.

Neither the jury, the sentencing court, nor the Arizona Supreme Court has expressly resolved the dispute over who drove the car over the victim's body. Yet the Arizona Supreme Court's conclusion that Richmond's mental state was "especially heinous" turns on the tacit assumption that he was the driver.

Just as the jury's verdict did not necessarily determine that Richmond was the driver, the trial court's finding that the murder was "especially cruel or heinous" did not turn on any finding that Richmond was the driver. Nor did it turn on any conclusion about Richmond's mental state. At the time Richmond was sentenced in 1980, the Arizona Supreme Court had not yet narrowed the definition of "especially heinous" to restrict the application of that aggravating circumstance to determinations of the defendant's mental state or attitude. The sentencing court did not explain why it concluded that the aggravating circumstance applied, nor did it assume that Richmond was driving the car when the victim was run over. The findings and special verdict of the sentencing court do not even discuss the identity of the driver.

Nevertheless, the identity of the driver was an issue on appeal to the Arizona Supreme Court. While Richmond's case was on appeal, the United States Supreme Court decided *Edmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), which held that the Constitution forbids capital punishment for certain types of felony murder convictions. In *Edmund*, the Court determined that states cannot execute defendants convicted of felony murder unless they actually killed, attempted to kill, or intended that a killing occur. *See Cabana v. Bullock*, 474 U.S. 376, 378, 106 S.Ct. 689, 693, 88 L.Ed.2d 704 (1986). Richmond contended that the ruling of *Edmund* should spare him from execution.

The Arizona Supreme Court's discussion of the *Edmund* argument is the only section of the state supreme court

opinion that discusses the dispute over the driver's identity. As I read the opinion of the state supreme court, it determined that Richmond's *Edmund* argument was a loser no matter who drove the car. Even under Richmond's version of the facts, the court noted, Richmond's level of involvement in the crime was substantial enough that it satisfied *Edmund*, without regard to whether Richmond was responsible for the final lethal action. *See State v. Richmond*, 666 P.2d at 63.

Although the Arizona Supreme Court discussed the dispute over the identity of the driver, the Arizona courts resolved the *Edmund* question without determining whether or not Richmond drove the car. The Arizona Supreme Court was institutionally incapable of resolving the credibility dispute over the identity of the driver. *See Cabana v. Bullock*, 474 U.S. 376, 388 n. 5, 106 S.Ct. 689, 698 n. 5, 88 L.Ed.2d 704 (1986). Conceivably, the Arizona Supreme Court could have determined that the sentencing court actually made an *Edmund* finding, and could have further determined that such a finding was supported by the evidence. The record, however, shows that the sentencing court made no *Edmund* finding, nor did it determine whether Richmond or Corella drove the car over the victim.[4] The opinion of the panel confirms that it was the

[4] The opinion of the Arizona Supreme Court includes one sentence that suggests that the sentencing court resolved the credibility conflict and made a factual finding that Richmond drove the car. The court said that "the trial judge was justified in concluding that appellant drove the vehicle that was used to kill the victim." *State v. Richmond*, 136 Ariz. 312, 666 P.2d 57, 63 (1983). This sentence suggests that the Arizona Supreme Court believed that the trial court made a finding about the driver's identity. If so, then the court was mistaken. There is simply nothing in the record to suggest that the trial judge made *any* conclusion about whether Richmond or Corella drove the car. If any state court can be said to have determined the identity of the driver, it is the Arizona Supreme Court, not the sentencing court. Yet the Arizona Supreme Court could not rationally determine whether it was Richmond or Erwin who was telling the truth.

state supreme court, not the sentencing court, that resolved the *Edmund* question. *See Richmond* 921 F.2d at 948 ("Nor does it matter that the *Edmund* finding was made by the state supreme court rather than by the original sentencing court").

In sum, although the sentencing court may have been capable of resolving the dispute over the identity of the driver, it did not do so. The factfinder in this case can only be the Arizona Supreme Court. Yet the Arizona Supreme Court could not rationally resolve this factual dispute on the basis of a cold record. *See Cabana*, 474 U.S. at 388 n. 5, 106 S.Ct. at 698 n. 5. Nevertheless, the Arizona Supreme Court's conclusion that Richmond's mental state was "especially heinous" depends on the assumption that Richmond, not Corella, deliberately drove the car over the victim's body. Applying the deferential standard articulated by the Supreme Court, I do not see how, under these circumstances, any rational factfinder could conclude that the "especially heinous" aggravating circumstance, as narrowed and defined by the Arizona Supreme Court, applied in this case.

II

Richmond was sentenced to death on the basis of three aggravating factors. Because Richmond does not challenge the application of two of those aggravating factors, the panel asserts in part IV.D. of its opinion that any error in applying the "especially heinous" aggravating circumstance is harmless. I strongly disagree. In Richmond's case, the trial court arrived at a verdict of death only after weighing the mitigating evidence against the aggravating factors. Because the ultimate sentencing determination in Arizona involves a balancing of the mitigating evidence against the aggravating factors, Arizona is a "weighing" state, as the Supreme Court used that term in *Clemens v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 1446, 1450, 108 L.Ed.2d 725 (1990). If the sen-

tencing court's balancing included a constitutionally invalid aggravating factor, the fact that the scales also contained a valid aggravating factor does not, as the panel believes, dispose of Richmond's claim. In weighing states, the rule of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), forbids such an "automatic rule of affirmance," because "it would not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." *Clemons*, 110 S.Ct. at 1450. There must either be a resentencing, *see Creech v. Arave*, 928 F.2d 1481, 1489 (9th Cir.1991); *Adamson v. Ricketts*, 865 F.2d 1011, 1038-39 (9th Cir.1988) (en banc), or at a minimum, the Arizona courts must reweigh the defendant's mitigating evidence against the valid aggravating factors.

In expounding its view that any error in the finding of the "especially heinous" aggravating circumstance was harmless, the panel begins with the erroneous premise which it advances without citing any case law, that Arizona is not a weighing state. *See Richmond*, 921 F.2d at 947. That premise is simply wrong. The language of the Arizona statute, as well as the cases of this court and the Arizona Supreme Court, establish that Arizona is indeed a weighing state.

It appears that the panel misreads Arizona law simply because the statute's text does not include the word "weigh." Nevertheless, it is clear that the statute requires weighing. If the trial court finds any aggravating circumstances, it must then make findings on the existence of mitigating circumstances. It is only after the trial court has made findings on the existence of both that it must make the sentencing decision. The statute requires a sentence of death if there are any aggravating circumstances "and there are no mitigating circumstances sufficiently substantial to call for leniency." Ariz.Rev.Stat. § 13-703(E).

Without citing any authority, the panel mistakenly concludes that the aggravating circumstances do not influence the Arizona sentencer's inquiry into whether the mitigating circumstances are sufficiently substantial. 921 F.2d at 947. On the contrary, it is clear that the trial judge determines whether the mitigating circumstances are "sufficiently substantial" by evaluating them in relation to the aggravating circumstances that exist. This is a balancing, a process of weighing.

Numerous cases of the Arizona Supreme Court confirm that the sentencer determines whether mitigating evidence is "sufficiently substantial" by weighing it against aggravating circumstances. *See, e.g., State v. Rossi*, 146 Ariz. 359, 706 P.2d 371, 379 (Ariz.1985) ("Once the trial judge finds that defendant's capacity was significantly impaired . . . a mitigating factor arises which is then weighed against any aggravating circumstances that the trial judge may find to determine whether mitigating factors are sufficiently substantial to call for leniency"); *State v. Harding*, 670 P.2d 383, 397 (Ariz.1983) ("We have described the formula of 'sufficiently substantial to call for leniency' as involving the weighing of aggravating against mitigating circumstances on the basis of the gravity of each circumstance."); *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1, 13 (1983) (determining whether mitigating circumstances are sufficiently substantial involves weighing and balancing of aggravating and mitigating circumstances that are present). The Arizona Supreme Court has clearly explained that determining whether mitigating circumstances exist is distinct from the final balancing test:

> [T]he trial court acts first as the fact finder. It must consider whether the state has proven any of the aggravating factors. . . . It must also determine whether the defendant has shown mitigating circumstances. . . . After the trial court has made these findings of fact, it then engages in a balancing test

in which it determines whether the mitigating factors are sufficiently substantial to call for leniency.

State v. Leslie, 147 Ariz. 38, 708 P.2d 719, 730 (1985), *quoted in Adamson v. Ricketts*, 865 F.2d 1011, 1063 (9th Cir.1988) (en banc) (Brunetti, J., dissenting). The Arizona case law thus confirms that the panel in this case has misconstrued the operation of the Arizona statute.

The panel has not simply misinterpreted Arizona law; it has also overlooked our prior cases. Although some portions of our opinion in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir.1988) (en banc), have not survived as good law, our description of the Arizona statute remains valid. We explained that after the parties have established the existence of aggravating and mitigating circumstances, "the court must weigh the aggravating circumstance(s) against the mitigating circumstance(s)." *Id.* at 1040; *see also id.* at 1065-66 (Brunetti, J., dissenting). In *Adamson*, the State of Arizona itself acknowledged that the statute requires the sentencer to balance. *See id* at 1043.[5]

In Richmond's case, the trial court found that there were a number of mitigating circumstances. *See State v. Richmond*, 136 Ariz. 312, 666 P.2d 57, 65 (1983). It was only by comparing them to the aggravating circumstances that the sentencer concluded that they were not sufficiently substantial to warrant leniency. If a reviewing court's analysis reduces the number of valid aggravating circumstances, it reduces the weight and gravity of the aggravating factors that the sentencer may permissibly consider. The reviewing court can no longer rely on an earlier finding that the mitigating circumstances were not sufficiently substantial to call for leniency. A new balancing must be conducted in order to determine whether the mitigating circumstances are sufficiently substantial in relation to the remaining valid aggravating factors.

[5] The panel's opinion also conflicts with our previous reading of the virtually identical language of Montana's capital sentencing statute. In Montana, as well as Arizona, the sentencer determines whether mitigating evidence is sufficiently substantial to warrant leniency by viewing it in relation to the aggravating circumstances that have been establised. *See Smith v. McCormick*, 914 F.2d 1153 (9th Cir.1990).

The panel fails to recognize that the findings of no mitigating circumstances sufficiently substantial to call for leniency is simply the end result of the balancing or weighing that the Arizona statute requires. It is not an isolated finding of fact. It depends on the nature and gravity of the aggravating circumstances. If the sentencing court weighed the mitigating circumstances against both valid and invalid aggravating circumstances, then the sentence of death cannot stand. At a minimum, there would have to be a determination whether the mitigating circumstances, when weighed against the remaining valid aggravating circumstances, were sufficiently substantial to call for leniency.

III

Because no rational sentencer could have found that the "especially heinous" aggravating factor applied, Richmond is entitled to further proceedings in the state courts. Richmond presented a considerable amount of mitigating evidence at his sentencing hearing. Indeed, one justice of the Arizona Supreme Court would have reversed the sentence of death on the strength of the mitigating evidence. *See Richmond*, 666 P.2d at 69 (Feldman, J., dissenting). Richmond is entitled to have the Arizona courts reevaluate the strength of that mitigating evidence in relation to the valid aggravating factors, with the invalid "especially heinous" factor removed from the scales.

SUPREME COURT OF THE UNITED STATES

No. 91-7094

WILLIE LEE RICHMOND,
Petitioner

v.

SAMUEL A. LEWIS, Director,
Arizona Department of Corrections, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 30, 1992

No. 91-7094

In The

Supreme Court of the United States

October Term, 1991

WILLIE LEE RICHMOND,

Petitioner,

v.

SAMUEL A. LEWIS, Director Arizona Department of Corrections; and ROGER CRIST, Superintendent of the Arizona State Prison,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether petitioner's death sentence contravenes the Eighth and Fourteenth Amendments because it was upheld by the Arizona Supreme Court on the basis of an application of Arizona's "especially heinous, atrocious or cruel" aggravating circumstance which either extends the circumstance to a set of facts that no rational factfinder could conclude fall within it or arbitrarily assumes a set of facts that no actual factfinder has ever found in this case.

2. Whether a federal habeas corpus court may apply a rule of "automatic affirmance" to a death sentence which was based on both constitutional and unconstitutional aggravating circumstances, when the law of the state that imposed the sentence requires the sentencer to weigh these aggravating circumstances against the mitigating circumstances in determining the penalty.

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The opinion of the Court of Appeals is reported at 948 F.2d 1473 and appears at J.A. 104. The Court of Appeals' order amending its opinion and denying rehearing and rehearing en banc appears at J.A. 102. The opinion of the four judges dissenting from the denial of rehearing en banc appears at J.A. 139. The decision of the District Court is reported at 640 F.Supp. 747.

The first opinion of the Supreme Court of Arizona affirming the Petitioner's conviction and death sentence is reported at 560 P.2d 41 and appears at J.A. 46. The divided opinion of the Supreme Court of Arizona affirming Petitioner's death sentence after resentencing is reported at 666 P.2d 57 and appears at J.A. 77.

The trial court's sentencing decisions are unreported. A copy of the minute entry containing the original sentencing decision appears at J.A. 43. A copy of the minute order on resentencing appears at J.A. 73.[1]

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was issued December 26, 1990; a timely Petition for Rehearing was denied on October 17, 1991. This Petition was filed on January 15, 1992. The

[1] A copy of the transcript of the trial court's remarks on resentencing appears at Appendix D to the Petition for Certiorari.

jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case also involves the Fourteenth Amendment to the Constitution of the United States, which provides in part:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the following provisions of the law of the State of Arizona:

– Arizona Revised Statutes § 13-703E, which provides:

> In determining whether to impose a sentence of death or life imprisonment without possibility of release on any basis until the defendant has served twenty-five calendar years if the victim was fifteen or more years of age or thirty-five calendar years if the victim was under fifteen years of age, the court shall take into account the aggravating and mitigating circumstances included in subsections F and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

– Arizona Revised Statutes § 13-703F, which provides in part:

> Aggravating circumstances to be considered shall be the following:
>
> • • •
>
> 6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

STATEMENT OF THE CASE

Petitioner Willie Lee Richmond is under a death sentence imposed by an Arizona judge, upon a jury verdict finding him guilty of the felony murder of Bernard Crummett in August, 1973.

1. The Offense and Trial.

There is little dispute about the basic facts of the crime for which Petitioner was sentenced to death. They were summarized by the Arizona Supreme Court as follows:

> The conviction arose from a 1973 incident where appellant and his 15-year-old girlfriend, Faith Erwin, accompanied Becky Corella and Bernard Crummett to a Tucson motel. Becky had arranged to perform an act of prostitution with Crummett. Becky informed appellant that

Crummett was "loaded." Appellant decided to rob Crummett.

Appellant accompanied by the two women and Crummett drove to a deserted area outside Tucson ostensibly for Crummett to engage in another act of prostitution with Becky. Appellant stopped the car feigning a flat tire. Appellant alighted from the car and went to the passenger side where he pulled Crummett from the car. Appellant knocked Crummett to the ground, and, as Crummett lay on the ground, appellant hit him with several large rocks, causing Crummett to lose consciousness. Becky took the victim's watch and wallet from his pockets. Appellant and the two women left Crummett lying unconscious on the ground, but, before leaving, the vehicle was twice driven over him.

Medical testimony revealed that Crummett died of a compressive injury to the skull consistent with the excessive force of a wheel of a car. At trial Faith Erwin testified that appellant was the driver of the automobile when it was driven over the victim. Appellant claimed that Becky Corella was the driver.

J.A. 78.

Faith Erwin's testimony was given under a grant of immunity from prosecution for her role in the crime. J.A. 33. This is what she said regarding Mr. Crummett's death:

> A. [Erwin] Well, they all got in the car, and Becky [Corella] was getting the wallet and what else, you know. I looked over to see what else was taken. And Becky [Corella] was getting the wallet and we came in the car and left.

> Q. And where did you go from there?
>
> A. Back to the Sands Motel.
>
> Q. Did you run over anything?
>
> A. Yes, a man. It was a bump, after we were leaving.
>
> Q. After you felt that bump, was anything said in the car when you felt that bump?
>
> A. Becky [Corella] said, it felt like a man's body.
>
> Q. Who was driving the car?
>
> A. Willy [sic].

J.A. 26. On cross-examination, Erwin admitted that at the crucial moment she was under the influence of drugs and was lying down in the back seat of the car with her eyes closed. J.A. 26, 28. She said she was uncertain whether Rebecca Corella was in the front or back seat, but she was sure it was Willie Richmond who was driving. J.A. 28. A defense witness testified to a prior inconsistent statement, in which Erwin had said that Rebecca Corella was the driver. Tr. Trial 663.

Petitioner did not testify. His version of the events came from a taped statement which was offered into evidence by the prosecution. In that statement, which was taken from him by police on the night he was served with

the arrest warrant in this case,[2] he described the events as follows:

> I opened the door. I snatched the dude out by his collar, and bam, he falls straight out. I wanted to go through his pockets, but she [Corella] was already going through his pockets and he was getting up and I reached down and punched him again. So my old lady, Faith Erwin, she couldn't take it. She got out of the car and she looked and she started crying, you know. And about that time I am looking at her, and going through his change. And this rock, you know, like that, and dip, dip like that, you know. And I said, wow, to myself, you know. Come on let's get in the car and me and her [Erwin] get in the car, and I am talking to her [Erwin] and Rebecca [Corella] gets in the car and she backed up and she throws up in gear and comes back over. And we were going on down further and she was all over the fucking road, and said give me this motherfucking car and let me drive, you know.

J.A. 36.

Rebecca Corella was not called to testify by either side – although she, too, was granted immunity from prosecution.

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[2] At the time of his statement, Petitioner was in jail under unrelated charges, on which he was represented by counsel. There was evidence that the police had served him with the arrest warrant in order to obtain a waiver of counsel and a statement from him; but the statement was held admissible. *See* J.A. 49-51.

The remaining trial evidence regarding Bernard Crummett's death was circumstantial. The most important of this evidence came from the state's pathologist, Dr. James Holka. Dr. Holka testified that the injuries on Mr. Crummett's body indicated a car had passed over him more than once, from "at least two directions." J.A. 6. The first of the injuries was to the head, and instantly caused death. J.A. 14. The later injuries were to the trunk; these did not exhibit hemorrhaging, which indicated they had occurred after death and the cessation of blood circulation. J.A. 7.

Dr. Holka was questioned extensively on the probable length of time between the initial and later injuries. J.A. 15-22. Most of this questioning came from defense counsel, who was attempting to support the theory that Mr. Crummett might have been run over by another car, after the robbers fled the scene.[3] However, Dr. Holka made his clearest statement on this point during questioning by the prosecutor about his estimate that "thirty seconds" was an "approximate minimum period of time" between the initial and later injuries:

> That is based on the fact that venous circulation in an adult male for his build would be approximately twenty seconds, if the heart were faster than fifteen if slower than twenty-five. So, we are giving a slight edge there in agreeing to about thirty seconds.

J.A. 19-20.

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[3] *See* J.A. 19, 21. Also in support of this theory, the defense called Charles Palmer, an attendant at a service station near the scene of the crime, who testified that approximately four cars drove down the road where the body was found, after the time of the homicide. J.A. 38.

The trial judge instructed the jury that it could convict Petitioner of first-degree murder upon either a finding of premeditation or a felony-murder theory.[4] These were its instructions defining these offenses:

> Murder is the unlawful killing of a human being, with malice aforethought.
>
> * * *
>
> The unlawful killing of a human being whether intentional, unintentional, or accidental which occurs as a result of the perpetration of or attempt to perpetrate the crime of robbery and where there was in the mind of the perpetrator a specific intent to commit such crime is murder of the first degree.
>
> * * *
>
> If a human being is killed by any one of several persons engaged in the perpetration of or attempt to perpetrate the crime of robbery, all persons who either directly or actively commit the act constituting such crime or who knowingly and with a criminal intent aid and abet in its commission, or whether present or not who advise or encourage its commission are guilty of murder in the first degree, whether the killing is intentional, unintentional, or accidental.

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[4] The Information by which Petitioner was charged originally alleged that he had killed Mr. Crummett "with malice aforethought and premeditation and deliberation." The premeditation allegation was stricken by Judge Roylston. *See* J.A. 2. However, over defense objection, the prosecution was permitted to proceed at trial on alternative theories of premeditated and felony-murder.

J.A. 108; *see* J.A. 41. There were no instructions on lesser degrees of homicide. The jury returned a general verdict finding Petitioner guilty of first-degree murder. J.A. 42.

2. The First Sentencing and Appeal.

Pursuant to Arizona law, the sentencing hearing was held before the trial judge alone. The trial judge was Richard Roylston.

In his sentencing verdict, Judge Roylston found two "aggravating factors": a prior conviction involving a threat of violence,[5] and the commission of the instant offense in "an especially heinous and cruel manner". J.A. 44. The judge rejected the defendant's proffered mitigation, holding that it did not make out any of the mitigating circumstances listed in the Arizona law, and imposed a sentence of death. *Ibid.*; *see* J.A. 63.

After this sentencing, Mr. Richmond's lawyers filed a Petition for Post-Conviction Relief, based on newly discovered evidence which substantiated the defense claim that Rebecca Corella was actually driving the getaway car when it accidentally ran over Bernard Crummett. The Petition was supported by affidavits from two people

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[5] The prior conviction was for an armed kidnapping incidental to a robbery. The victim of the robbery, who was uninjured, was called to testify to establish that the crime included a threat of violence. *See* J.A. 62; Tr. Resentencing I:42-56.

who swore that Ms. Corella had admitted this to them.[6] The trial court denied the Petition without a hearing.

On appeal, the Arizona Supreme Court affirmed Mr. Richmond's conviction and sentence, rejecting all his state law claims and constitutional objections to his death sentence. *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41 (1976), *cert. denied*, 433 U.S. 915 (1977); J.A. 46. The Court also affirmed the denial of the post-conviction relief petition, holding that Mr. Richmond was "criminally liable for this murder regardless of whether he or his accomplice was driving the vehicle at the time in question." J.A. 58.

3. The Resentencing and Second Appeal.

Petitioner's sentence was vacated, and resentencing was ordered, as a result of decisions by the United States District Court and the Supreme Court of Arizona, which held the Arizona death penalty statute invalid under *Lockett v. Ohio*, 438 U.S. 586 (1978). *Richmond v. Cardwell*, 450 F.Supp. 519 (D. Ariz. 1978); *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978).

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[6] In response to the Petitioner's motion, the prosecutor filed an affidavit which stated that during the trial Ms. Corella had "threatened to take the stand for the defense and take the blame for the murder," but defense counsel had elected not to call her. *See* Resp. Br. Opp. Exhibit B-1. Attached to the affidavit was a transcript of a taped statement by Ms. Corella, in which she said that Willie Richmond was driving the vehicle when Bernard Crummett was run over, "once". *Id.* at Exhibit C-9.

At the resentencing hearing, the State again presented witnesses regarding the defendant's criminal record, but otherwise rested on the trial evidence.[7] The defense called sixteen witnesses, on two subjects. Thirteen of them – including members of Petitioner's family, friends, and two prison staff members – testified about substantial positive changes he had undergone while on death row. *See* J.A. 97-99. The other witnesses were called to support the defense argument that Rebecca Corella caused Bernard Crummett's death. They testified that, contrary to her statements to police, Corella could drive the car in question, which belonged to her boyfriend; and that she or Faith Irwin had previously admitted she was driving the car when it ran over Bernard Crummett. See J.A. 142.

In his second sentencing verdict, Judge Roylston found three aggravating circumstances – the original two, plus a third based on a homicide conviction entered after the first sentence was imposed.[8] J.A. 73-74. As he had in the first sentencing order, with regard to the "heinous, cruel or depraved" aggravating factor, Judge Roylston

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[7] The prosecution did not rely upon the statements of Rebecca Corella it submitted in postconviction proceedings. Under Arizona law, aggravating circumstances must be established by admissible evidence. Ariz. Rev. Stat. § 13-703(C).

[8] The homicide on which the new aggravating circumstance was based occurred before Bernard Crummett's. Mr. Richmond was also subsequently tried on a third murder charge, at which the state's primary witness was Rebecca Corella, and the defense was that the crime was, in fact, committed by Ms. Corella; the jury acquitted Mr. Richmond on that charge.

stated without elaboration "that the Defendant did commit the offense in an especially heinous and cruel manner." *Ibid*. In mitigation, he found most of the matters the defense had argued, except the defendant's claim of rehabilitation, on which he said he was "unable to make a definitive finding." J.A. 75. Among the facts found in mitigation were that "Rebecca Corella was involved in the offense but was never charged" and "the jury was instructed both on the matters relating to the felony murder rule, as well as matters relating to premeditated murder." *Ibid*. The sentencing decision did not otherwise address the question of who was driving the car at the time it ran over Mr. Crummett and caused his death. It concluded:

> that considering both the enumerated circumstances in the statutes and the enumerated circumstances raised by the Defense, and having considered them separately and as a whole, THE COURT FINDS that there are no mitigating circumstances sufficiently substantial to call for leniency.

J.A. 76.

On appeal, the Arizona Supreme Court once again upheld Petitioner's death sentence. There were three separate opinions. The "majority" opinion,[9] signed by Justices Holohan and Hays, affirmed the trial court in all

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[9] We mean no disrespect by our references to "the 'majority' opinion." The separate concurring and dissenting opinions use that phrase; but it is of considerable significance that Justice Holohan's opinion did not, in fact, reflect the views of a majority of the Arizona Supreme Court on the matters at issue here. That is why we repeat the reference in this Brief, and use quotation marks.

respects, except its finding that the offense was "especially cruel." J.A. 77-92. Concurring, Justices Cameron and Gordon held that the crime could not properly be found "heinous," but voted to affirm the sentence. J.A. 92-96. A dissenting opinion, by Justice Feldman, agreed with the concurrence that the crime was not "heinous," and voted to reduce the sentence to life imprisonment. J.A. 96-101.

The concurring and dissenting opinions did not dispute the summary of the facts of the case in Justice Holohan's "majority" opinion, which is set forth above. *See* page 4. There was also no disagreement over the rejection of Petitioner's claim that his death sentence was imposed in violation of *Enmund v. Florida*, 458 U.S. 782 (1982). It was with reference to the latter point that Justice Holohan's opinion made its most specific statements regarding its view of Petitioner's role in the offense:

> Appellant admitted he planned the robbery, drove the victim into the desert and knocked the victim unconscious to rob him. Faith Erwin testified that appellant threw rocks at the victim after he knocked him to the ground. Bloody rocks were found at the scene. The medical examiner testified that there were two kinds of force applied to the victim's skull – one which was consistent with the automobile tire and another in which there was external application of a pointed object. There is, however, no evidence that the latter force alone would have killed the victim.
>
> Even if we accept appellant's contention that he was not driving the car when the victim was run over, we do not believe this case falls

within the parameters of *Enmund*. The facts from the appellant's version indicate that he was the leader of the group; he was the first to use violent force on the victim; he was aware that the victim, if allowed to live, could identify him.[10] Appellant, from his version of the facts, was willing to leave the wounded and unconscious victim alone in the desert to an uncertain fate. Appellant contends that Becky Corella was the one who drove the car over the victim. There is no evidence that appellant protested or showed any emotion when the victim was twice run over. The appellant's version of the facts indicates appellant played an integral part in the events which caused the victim's death, and he willingly assisted in the acts which were intended to cause the victim's death.

The evidence presented by the state was that the appellant drove the vehicle over the victim, thus killing him. The testimony of Faith Erwin was that the appellant was the driver at the time the victim was run over. The circumstantial evidence supports Faith's testimony. The circumstances show that appellant was the driver when the group left for the desert. The other woman, Becky Corella, was so short in stature that it was difficult for her to operate an automobile. Appellant was the leader of the

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[10] We are aware of no specific evidentiary basis for this statement. Justice Holohan's first opinion noted an inconsistent fact: Petitioner had earlier said to Faith Erwin "that the three were going to rob the victim, but not in the apartment because Crummett would remember the location." J.A. 46.

group and directed the operation. With such support we believe the trial judge was justified in concluding that appellant drove the vehicle that was used to kill the victim.

Under either version of the facts appellant does not fit within the sphere of defendants the *Enmund* court seeks to protect from capital considerations. The evidence in this case shows that appellant intended to take a life.

J.A. 83-84.

Justice Holohan's "majority" opinion also addressed the facts in its review of the trial court's determination that the offense was "especially cruel and depraved." Expressing the court's unanimous judgment, it reversed the first part of this finding because of the lack of evidence of conscious suffering by the victim, prior to his death:

> We do not find the offense to be especially cruel; there is no evidence in the record to indicate the victim suffered more pain than that of the initial blow which rendered him unconscious.

J.A. 86. In support of its minority view that the killing was "heinous" and "the trial court could have found that the offense was committed in an especially depraved manner," Justice Holohan's opinion said this:

> "Heinous" has been defined as "hatefully or shockingly evil; grossly bad," and "depraved" is "marked by debasement, corruption, perversion or deterioration." *State v. Knapp, supra*. Heinous and depraved involve the mental state and attitude of the offender as reflected in his words and actions. *State v. Gretzler, supra; State v. Poland, supra; State v. Lujan, supra*. In *Gretzler, supra,*

we discussed factors which lead to a finding of heinousness or depravity. One factor is the infliction of gratuitous violence on the victim; another related factor is the needless mutilation of the victim. Here the victim was already unconscious and bleeding when he was run over not once, but twice, each time from a different direction. The evidence indicates that the first run by the vehicle was over the victim's head crushing his skull and killing him. The second run of the vehicle was over the body of the victim. The investigating officers found, at the location of the murder, two large pools of blood separated by about 30 feet, which was consistent with the body having been run over and dragged to where it was found. Again the fact that the victim in the instant case was run over twice and his skull was crushed, we find to be a ghastly mutilation of the victim.

> The presence of any one of the three elements – cruel, heinous, or depraved – is sufficient to constitute an aggravating circumstance. *State v. Bishop*, 127 Ariz. 531, 622 P.2d 478 (1980). We believe the facts of this case set it "apart from the normal first degree murders." *State v. Brookover*, 124 Ariz. 38, 601 P.2d 1322 (1979).

J.A. 86-87.

The opinion then went on to conduct an "independent examination of the record to determine for ourselves the presence or absence of aggravating and mitigating circumstances and the weight to give to each." J.A. 88. It concluded that "the mitigation offered by appellant is not sufficiently substantial to outweigh the aggravating circumstances," noting particularly the defendant's other

murder conviction and "the gruesome manner in which this murder was committed." J.A. 90.

The separate opinion of the two concurring Justices disagreed with the finding that this crime was especially heinous and depraved. J.A. 92. It said this:

> Here there is no suggestion of distinct acts, apart from the killing, specifically performed to mutilate the victim's body. Any disfigurement of the victim in this case was the direct result of the killing itself. I do not believe we should stretch the definition of "mutilation" to cover all murders in which the victim's body is disfigured, where there is no indication of a separate purpose to mutilate the corpse. It is true, of course, that the appearance of the victim in this case was "ghastly" as the majority states. But as the United States Supreme Court has recently said in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (reversing an application of Georgia's statutory aggravating circumstance of "outrageously or wantonly vile, horrible or inhuman"),
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> > [I]t is constitutionally irrelevant that the petitioner used a shotgun instead of a rifle as the murder weapon, resulting in a gruesome spectacle in his mother-in-law's trailer. An interpretation of [the aggravating circumstance] so as to include all murders resulting in gruesome scenes would be totally irrational. *Id.* at 433, n.16, 100 S.Ct. at 1767, n.16, 64 L.Ed.2d at 409, n.16 (plurality opinion) *See also id.* at 435, 100 S.Ct. at 1768, 64 L.Ed.2d at 410-11 (Marshall, Brennan, J.J., concurring) ("[We] also agree that • • • the fact that the murder weapon was one which

> caused extensive damage to the victim's body is constitutionally irrelevant.")

J.A. 94-95. The concurring Justices concluded "[t]his crime is therefore not above the norm of first degree murders." J.A. 95. They explained their agreement that the death sentence should be nonetheless affirmed, as follows:

> The criminal record of this defendant, however, clearly places him above the norm of first degree murderers. He has been convicted of another first degree murder and a kidnapping, each arising in separate incidents. This history of serious violent crime justifies the imposition of the death penalty.

J.A. 95-96.

Justice Feldman's dissenting opinion agreed with the concurrence "that the murder was not heinous and depraved," and "the crime here does not stand out 'above the norm of first degree murders'; thus, the imposition of the death penalty in this case is clearly based upon the character of the defendant." J.A. 96. However, he argued that "independent review on the death penalty issue involves more than a determination of whether the trial court's imposition of this penalty can be supported by the record." J.A. 100. After extensively reviewing the mitigating evidence, he concluded that it called for a reduction of Petitioner's sentence to life imprisonment:

> While the aggravating circumstances which were found to exist may indicate that the defendant was above the norm of murderers, the evidence of changed character is persuasive mitigation. Review of this record indicates

> strong evidence of rehabilitation and the probability that if allowed to live, defendant will make a contribution of some value to society. Then what is to be gained by imposing death under these circumstances? Except in the physical sense, the defendant whom we today consign to the gas chamber is not the same person who committed the crime in 1973 and was first sentenced to death in 1974.

Ibid.

4. The Proceedings and Opinions Below.

Petitioner's federal habeas corpus petition was summarily dismissed by District Court Judge Alfredo Marquez. *Richmond v. Ricketts*, 640 F. Supp. 767 (D. Ariz. 1986).[11] Judge Marquez rejected Petitioner's *Godfrey* claim, with this reasoning:

> Of the five justices on the Supreme Court, none of them found the killing to have been especially cruel. Three of them held that the killing did not satisfy either the especially heinous or depraved standards. Since a majority of the Supreme Court found this circumstance to be

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[11] Judge Marquez initially dismissed the petition on his own motion, before the Respondent filed an answer; the Court of Appeals reversed and remanded. *Richmond v. Ricketts*, 730 F.2d 1318 (9th Cir. 1984). On remand, Judge Marquez again summarily dismissed the petition and denied a certificate of probable cause. The Court of Appeals again granted a certificate of probable cause and reversed and remanded for a review of the state court record. *Richmond v. Ricketts*, 774 F.2d 957 (9th Cir. 1985). The final dismissal in District Court came after this second remand.

> absent, this court must conclude that Richmond's sentence of death is not based on the application of that aggravating circumstance.

640 F.Supp. at 795-96.

The Court of Appeals granted a certificate of probable cause, but affirmed. J.A. 104. Its panel opinion did not accept Judge Marquez' reasoning with respect to the present issue, but held that neither of the opinions of the Arizona Supreme Court ran afoul of this Court's Eighth Amendment precedents.

Regarding the Arizona "majority's" determination that the crime was "heinous" or "depraved," it held the only question before it was whether a "rational factfinder" could have so found under " 'the definition given to the "especially cruel" provision by the Arizona Supreme Court . . . . ' " J.A. 128, *quoting Walton v. Arizona*, 110 S.Ct. 3047, 3058 (1990). Without specifying the factual basis for its conclusion, it said "that under that definition a rational factfinder could indeed have found Crummett's murder heinous or depraved so as to warrant the penalty of death." *Ibid.*

> The fact that a majority of the court did not concur in this finding, however, does not deny that the Justices who did concur in it provided an adequate limiting construction. The relevant point is that members of the court who premised their votes on the challenged factor undertook the deliberations and analysis constitutionally required.
>
> More importantly, Richmond's observation is irrelevant in light of the fact that *four* Justices concurred in the finding of two other aggravating circumstances, either one of which could constitutionally have justified imposition of the death penalty.

J.A. 125 n.9.[12]

Petitioner's Suggestion for Rehearing En Banc was rejected, over four dissents. J.A. 104. The dissenters said they did not believe the "heinous" finding could be sustained in light of the fact that "[n]either the jury, the sentencing court, nor the Arizona Supreme Court has expressly resolved the dispute over who drove the car over the victim's body." J.A. 143. They also disagreed with the panel's reading of Arizona law, with regard to the constitutional significance of the invalidity of this aggravating finding:

> Without citing any authority, the panel mistakenly concludes that the aggravating circumstances do not influence the Arizona sentencer's inquiry into whether the mitigating circumstances are sufficiently substantial. 921 F.2d at 947. On the contrary, it is clear that the trial judge determines whether the mitigating circumstances are "sufficiently substantial" by evaluating them in relation to the aggravating circumstances that exist. This is a balancing, a process of weighing.
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> Numerous cases of the Arizona Supreme Court confirm that the sentencer determines whether

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[12] The original panel opinion said more succinctly, "the statute at issue here is not a weighing statute." *Richmond v. Lewis*, 921 F.2d 933, 947 (9th Cir. 1990). This language, but not the panel's analysis, was changed on rehearing.

mitigating evidence is "sufficiently substantial" by weighing it against aggravating circumstances.

J.A. 147.

In Richmond's case, the trial court found that there were a number of mitigating circumstances. *See State v. Richmond*, 136 Ariz. 312, 666 P.2d 57, 65 (1983). It was only by comparing them to the aggravating circumstances that the sentencer concluded that they were not sufficiently substantial to warrant leniency. If a reviewing court's analysis reduces the number of valid aggravating circumstances, it reduces the weight and gravity of the aggravating factors that the sentencer may permissibly consider. The reviewing court can no longer rely on an earlier finding that the mitigating circumstances were not sufficiently substantial to call for leniency. A new balancing must be conducted in order to determine whether the mitigating circumstances are sufficiently substantial in relation to the remaining valid aggravating factors.

J.A. 148-49.

Petitioner sought certiorari on the two issues addressed by these dissenting Judges. The Petition was granted on March 30, 1992.

SUMMARY OF ARGUMENT

The trial judge based Petitioner's death sentence in part on a finding that this offense was "especially heinous and cruel" under Arizona Rev. Stat. § 13-703(F).

J.A. 74. Petitioner's resentencing predated *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983); *Gretzler* supplied the narrowing construction which *Walton v. Arizona*, 110 S.Ct. 3047, 3057-58 (1990) found to have cured the facial vagueness of this statute. The trial judge's sentencing order applied no limiting definition, but simply recited the statutory terms. As the Court of Appeals panel recognized, this was constitutionally impermissible under *Maynard v. Cartwright*, 486 U.S. 356 (1988). J.A. 123.

This case therefore turns on the Arizona Supreme Court's exercise of its authority under *Clemons v. Mississippi*, 110 S.Ct. 1441 (1990), to independently determine the existence of this aggravating factor under a limiting construction, or to review for harmless error. The Arizona Supreme Court's two-Justice "majority" opinion attempted to take the first of these approaches; the two-Justice concurrence took the latter. The issue here is whether either fell into federal constitutional error. Petitioner submits both did.

1. Justice Holohan's "majority" opinion, which relies upon the F(6) aggravating factor, is not clear about the basis on which it does so.

The "majority" does not appear to have "affirm[ed] the death sentence by applying a limiting definition of the aggravating circumstance to the facts presented." *Walton v. Arizona*, 110 S.Ct. at 3057. Although its opinion recites one of *Gretzler*'s limiting phrases, it then changes its words (from "needless mutilation" to "ghastly mutilation"), making it irrelevant whether the Petitioner actually caused the victim's death. This changed the basic nature of the construction of this aggravating factor,

which had previously focused on "the mental state and attitude of the offender as reflected in his words and actions." On the facts of this case, it was impossible to address the latter question without deciding whether Petitioner was driving; yet the opinion pointedly refrained from doing that. To the extent it addressed this factual issue at all, it appears to have "affirm[ed] the sentence based on a mischaracterization of the trial judge's findings." *Parker v. Dugger*, 111 S.Ct. 731, 739 (1991).

Alternatively, the "majority" opinion could be read as establishing a new and broader definition of a category of "heinousness." However, the rejection of that proposal by the three of the five Arizona Supreme Court Justices means that "definition" is not part of Arizona law. Moreover, to perform its constitutional function, a limiting definition must necessarily be "establish[ed] in advance." *Walton v. Arizona*, 110 S.Ct. at 3067 (concurring opinion of Justice Scalia). And as the other Arizona Justices pointed out, a limiting definition which "include[s] all murders resulting in gruesome scenes" would directly contravene *Godfrey v. Georgia*, 446 U.S. 420, 433 n.16 (1980).

The remaining, and most likely, possibility is that the "majority" Justices did what *Maynard* and *Godfrey* forbade: they "simply . . . reviewed all of the circumstances of the murder and decided . . . the facts made out the aggravating circumstance." *Maynard v. Cartwright*, 486 U.S. at 360.

2. Although they disagreed with the "majority's" reliance on the "heinous" aggravating circumstance, the

concurring Arizona Justices fell into constitutional error under *Clemons v. Mississippi, supra.*

As the fifth, dissenting Justice pointed out, their review was limited to "a determination of whether the trial court's imposition of this penalty can be supported by the record." J.A. 100. The concurrence found that support in the remaining aggravating factors, which involved the defendant's prior record. J.A. 95. But a criminal record does not eliminate "[t]he constitutional mandate of individualized determinations in capital-sentencing proceedings." *Sumner v. Shuman*, 483 U.S. 66, 75 (1987).

The requirement of individualized sentencing means that an "appellate court in a weighing state [cannot] . . . affirm a death sentence without a thorough analysis of the role an invalid aggravating factor played in the sentencing process." *Stringer v. Black*, 112 S.Ct. 1130, 1136 (1992). The concurrrence provided no such analysis.

The Court of Appeals panel below excused this by denying that Arizona is a weighing state. J.A. 131-32. But the Arizona Supreme Court has repeatedly said the opposite. The panel decision below simply misunderstood this. Recognition of it invalidates the decision of the concurring Justices in this case.

3. Although Petitioner submits that all four of the Arizona Supreme Court Justices who voted to affirm his death sentence erred, in one of these two ways, reversal is required even if he is only right on one of those submissions. Both two-Justice pluralities were necessary to provide the three votes necessary to affirm Petitioner's

sentence. Had either group voted differently, the outcome of the case would have been different. In such situations – when the votes of a plurality of lower court judges necessary to the decision below is based on an invalid premise – the Court has logically held that remand is required. *United Airlines v. Mahin*, 410 U.S. 623, 632 (1972). If the Court accepts either of Petitioner's submissions, that should be required here.

ARGUMENT

The Court has twice examined Arizona's "heinous, cruel or depraved" aggravating factor. *Walton v. Arizona*, *supra*; *Lewis v. Jeffers*, 110 S.Ct. 3092 (1990). Those decisions settled two basic points about this statute: (1) its unadorned language is facially vague and unconstitutional under *Maynard v. Cartwright*, 486 U.S. 356 (1988); and (2) the Arizona Supreme Court has developed a narrowing construction of the statutory language which meets Eighth Amendment standards. *See Walton v. Arizona*, 110 S.Ct. at 3056-58; *Lewis v. Jeffers*, 110 S.Ct. at 3102. In *Walton*, the Court also applied to Arizona the holding of *Clemons v. Mississippi*, 110 S.Ct. 1441 (1990), which permits a state appellate court reviewing a death sentence which is invalid under *Maynard* to

> itself determine whether the evidence supports the existence of the aggravating circumstance as properly defined or . . . eliminate consideration of the factor altogether and determine whether any remaining aggravating circumstances are sufficient to warrant the death penalty.

Walton v. Arizona, 110 S.Ct. at 3057. The questions presented here arise out of the manner in which two pluralities of the Arizona Supreme Court exercised that power.

I.

THE ARIZONA COURTS' RELIANCE ON THE "HEINOUS, CRUEL OR DEPRAVED" AGGRAVATING CIRCUMSTANCE VIOLATED THE EIGHTH AMENDMENT.

At both his sentencings, and on both of his state court appeals, Petitioner's death sentence was imposed and upheld partly on the basis of Arizona Rev. Stat. 13-703(F)(6), which lists among the "[a]ggravating circumstances to be considered" that "the defendant committed the offense in an especially heinous, cruel or depraved manner." *See* J.A. 44, 62, 74, 87. This was done despite the fact that neither the trial judge, nor the Arizona Supreme Court, clearly identified any words or action by Petitioner that made it so. Their decisions were thus fundamentally different from those in *Walton v. Arizona* and *Lewis v. Jeffers*, and are irreconcilable with this Court's Eighth Amendment precedents.

A. The Trial Court's Decision.

The trial judge who sentenced and resentenced Willie Richmond used only the bare statutory terms, "heinous and cruel." J.A. 44, 62. The original sentencing occurred in 1974, before any appellate decision had placed a limiting construction on those words. *See* J.A. 43. The resentencing predated *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1

(1983), which provided the narrowing definitions this Court relied upon in *Walton*, as a cure for the Arizona statute's facial vagueness.[13]

On the second appeal, the Arizona Supreme Court held unanimously that the trial court erred in its conclusion that the offense was "especially cruel." J.A. 86. Three of the five Arizona Justices – a majority – concluded that the crime was not "heinous." J.A. 95, 96. The two who held otherwise did so by an analysis of their own, based on *Gretzler*'s limiting definitions, which played no part in the trial court's decision. *See* pages 30-36, below.

The trial judge's finding of this aggravating factor thus cannot be sustained, either as a matter of Arizona

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[13] In its Brief in *Walton*, the Attorney General of Arizona summarized the *Gretzler* categories of "heinous" and "depraved" murders, as follows:

> The Arizona Supreme Court has held that a defendant's actions must fall into one of the following categories to constitute the aggravating circumstance: (1) relishing the murder; (2) infliction of gratuitous violence upon the victim above that which was necessary to complete the object of the crime; (3) needless mutilation of the victim; (4) senseless crime; or (5) helpless victim. *State v. Gretzler*, 659 P.2d at 11.

Brief of Respondent at 46, *Walton v. Arizona*, No. 88-7351. In both *Walton* and *Jeffers* the Arizona courts relied on actions of the defendants which placed them in the first of these categories. *See Walton v. Arizona*, 110 S.Ct. at 3058; *Lewis v. Jeffers*, 110 S.Ct. at 3097. *Walton* also involved a finding that the murder was "especially cruel." 110 S.Ct. at 3057-58.

law or under the federal constitution. The state law question was resolved by the Arizona Supreme Court's unanimous determination that the trial court erred in finding the offense "especially cruel," and by the votes of the three Arizona Justices who held that the trial court also erred in finding it "heinous." *See* J.A. 93-95, 96. To the extent this is an issue on which federal courts must give deference to the decisions of state judges, *see Lewis v. Jeffers*, 110 S.Ct. at 3103, their decision is controlling.

The constitutional question is easily answered, from this Court's precedents. The trial court used only the bare statutory words, "heinous" and "cruel." J.A. 74. "[T]here is no serious argument that . . . [those words are] not facially vague." *Walton v. Arizona*, 110 S.Ct. at 3057. Sentencing decisions based on instructions which include nothing more than those words are unquestionably invalid. *Stringer v. Black*, 112 S.Ct. 1130, 1134-35 (1992); *see also id.* at 1143 (dissenting opinion of Justice Souter).

Although "[t]rial judges are presumed to know the law and apply it in making their decisions," *Walton v. Arizona*, 110 S.Ct. at 3057, at the time of the resentencing decision in this case the law of Arizona did not limit the broad and vague scope of these terms. Before *Gretzler*, the caselaw definition of the words "heinous" and "depraved" in Arizona was this:

> heinous: hatefully or shockingly evil; grossly bad. . . . depraved: marked by debasement, corruption, perversion or deterioration.

State v. Knapp, 114 Ariz. 531, 562 P.2d 704, 716 (1977). *See* J.A. 70. Nearly identical "definitions" of similar terms

were held constitutionally inadequate in *Maynard v. Cartwright, supra,* and *Shell v. Mississippi,* 111 S.Ct. 313 (1990).[14]

The trial judge's decision thus cannot be sustained. The validity of Petitioner's sentence necessarily turns on the independent validity of the decision of the Arizona Supreme Court, which affirmed it.

B. The Arizona Supreme Court "Majority" Opinion.

The two Justice Arizona Supreme Court "majority" rejected the trial court's finding that the offense was "especially cruel," because "there is no evidence in the record to indicate that the victim suffered more pain than that of the initial blow which rendered him unconscious."

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[14] *See Shell v. Mississippi,* 111 S.Ct. at 313-14 (concurring opinion of Justice Marshall):

> "[T]he word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others." *Shell v. State,* 554 So.2d 887, 905-906 (Miss. 1989).
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> "[T]he term 'heinous' means extremely wicked or shockingly evil; 'atrocious' means outrageously wicked and vile; 'cruel' means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others." *Cartwright v. Maynard,* 822 F.2d 1477, 1488 (CA10 1987) (en banc).

Ibid. See also Moore v. Clarke, 904 F.2d 1226, 1229-30 (8th Cir. 1990), *cert. denied* 60 U.S.L.W. 3772 (May 18, 1992).

J.A. 86. Addressing the remaining questions of "heinousness" and "depravity," it began by reciting the general "definitions" that previous Arizona cases had given:

> "Heinous" has been defined as "hatefully or shockingly evil; grossly bad," and "depraved" is "marked by debasement, corruption, perversion or deterioration." *State v. Knapp, supra.*

Ibid. As that general language added no constitutionally significant "narrowing" to the facially vague statutory terms, (*see* note 14, above), the validity of the "majority's" analysis turns on the following passage, in which it elaborated upon its conclusion that this aggravating factor properly applied in this case:

> In *Gretzler, supra,* we discussed factors which lead to a finding of heinousness or depravity. One factor is the infliction of gratuitous violence on the victim; another related factor is the needless mutilation of the victim. Here the victim was already unconscious and bleeding when he was run over not once, but twice, each time from a different direction. The evidence indicates that the first run by the vehicle was over the victim's head crushing his skull and killing him. The second run of the vehicle was over the body of the victim. The investigating officers found, at the location of the murder, two large pools of blood separated by about 30 feet, which was consistent with the body having been run over and dragged to where it was found. Again the fact that the victim in the instant case was run over twice and his skull was crushed, we find to be a ghastly mutilation of the victim.

J.A. 86-7.

The Court of Appeals' panel apparently took this passage to mean that the Arizona "majority" had "affirm[ed] the death sentence by applying a limiting definition of the aggravating circumstance to the facts presented," consistent with *Walton v. Arizona*, 110 S.Ct. at 3057. *See* J.A. 123-26. However, the *Gretzler* definitions of "heinousness" focused on "the mental state and attitude of the perpetrator as reflected in his words and actions." *State v. Gretzler*, 659 P.2d at 10. Because of that, to apply them would require, at least, a determination that it was Petitioner who was driving the car when it passed over the victim after his death. Yet the language of Justice Holohan's "majority" opinion appears to carefully refrain from making any such finding, at this point or in its earlier discussion of the *Enmund* issue. *See* J.A. 83-4, 86-7.

In that earlier discussion, the opinion says that "the trial judge was justified in concluding that appellant drove the vehicle that was used to kill the victim." J.A. 84. But a review of the trial judge's sentencing orders reveals no such statement; to the contrary, the mitigation findings at the second sentencing hearing appear to give credence to the possibility that Rebecca Corella was the driver, and Petitioner was convicted on a vicarious, felony murder theory.[15] In this respect, Justice Holohan's opinion suffers from much the same problem found in *Parker v. Dugger*, 111 S.Ct. 731, 739 (1991): it "affirm[ed]

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[15] *See* JA 75 ("Rebecca Corella was involved in the offense but was never charged with any crime"); ("the jury was instructed both on matters relating to the felony murder rule, as well as matters relating to premeditated murder").

the sentence based on a mischaracterization of the trial judge's findings." "[M]eaningful appellate review requires that the appellate court consider the defendant's actual [conduct]." *Ibid.* "[T]his affirmance was invalid because it deprived [Petitioner] . . . of the individualized treatment to which he was entitled under the Constitution." 111 S.Ct. at 738, 740.

Even if it were assumed to contain an implicit *de novo* finding that Petitioner was driving, Justice Holohan's opinion would raise more questions than it would answer. For one thing, it would create the problem anticipated in *Cabana v. Bullock*, 474 U.S. 376, 388 n.5 (1986), by resolving an issue which "turn[s] on credibility determinations that could not be accurately made by an appellate court on a paper record."[16] In addition, it would violate due process by resting the "heinousness" finding on a wholly different basis from that argued at trial, one which defense counsel had no way to anticipate at the time the evidence came in. Cf. *Presnell v. Georgia*, 439 U.S. 14 (1978); *Cole v. Arkansas*, 333 U.S. 196 (1948).[17]

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[16] Although an earlier passage in the opinion says "the circumstantial evidence supports Faith [Erwin]'s testimony" (J.A. 84), the facts it points to seem equally consistent with Petitioner's spontaneous statements to police. *See* page 6, above. Moreover, Faith did not say the body was run over twice. *See* J.A. 26. Only Petitioner's description of the events squares with the pathologist's conclusion that occurred, which was the most significant single piece of circumstantial evidence in the case.

[17] In this connection, it is worth noting that it was defense counsel who elicited the testimony from Dr. Holka, regarding

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Beyond that, as Justice Cameron's concurring opinion points out, to find "needless mutilation" or "gratuitous violence" would require more than just a determination that Petitioner was driving; it would require a finding that he purposely ran over the victim a second time after he was dead. J.A. 93-4. Justice Holohan's "majority" opinion does not make such a finding; nor could it. As Justice Cameron points out, "there has been no showing that this defendant inflicted any violence on the victim which he must have known was 'beyond the point necessary to kill,'" and "there is no suggestion of distinct acts, apart from the killing, specifically performed to mutilate the victim's body." J.A. 94. If such a finding had been made, it could not be sustained even under the deferential standard of *Lewis v. Jeffers* and *Jackson v. Virginia*, 443 U.S. 307 (1979). But no such finding was made.[18]

In light of all these considerations, we do not believe Justice Holohan's opinion can be fairly read as applying the established *Gretzler* definitions to the trial court's "heinousness" determination. Alternatively, it could be construed as creating a new, expanded definition of "heinousness," which would apply whenever a killing results

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the lapse of time between the two sets of injuries to Mr. Crummett's body. *See* page 7, above. To later use that evidence to support an aggravation finding that had no precedent in Arizona law at the time of trial, seems particularly unfair. *Cf. Coleman v. McCormick*, 874 F.2d 1280 (9th Cir. 1988), *cert. denied* 110 S.Ct. 349 (1989).

[18] Again, to the extent a *Jackson* analysis applies here, it would appear to require deference to the decision of the 3-2 majority of the Arizona Justices on this point, who found no support for a finding of "heinousness" under these *Gretzler* definitions. *Cf. Burden v. Zant*, 111 S.Ct. 862 (1991).

in "ghastly" injuries. But that construction suffers from another set of problems. Since a majority of the Arizona Justices rejected this, it cannot be considered part of "the definition given to the . . . provision by the Arizona Supreme Court. . . . " *Walton v. Arizona*, 110 S.Ct. at 3058. If it were, as Justice Cameron pointed out, it would surely run afoul of the injunction in *Godfrey v. Georgia*, that "[a]n interpretation of [the aggravating circumstance] so as to include all murders resulting in gruesome scenes would be totally irrational." 446 U.S. at 433 n.16. And in any event, to perform their constitutional function, limiting definitions cannot be manufactured in and for a particular case; they must be "establish[ed] in advance." *See Walton v. Arizona*, 110 S.Ct. at 3067 (concurring opinion of Justice Scalia).

The only remaining possibility – and the one that we would submit its language best supports – is that Justice Holohan's opinion did not apply a narrowing definition at all, but simply relied on all the circumstances to determine that the crime was "heinous" and "depraved." If so, its decision plainly violates the teachings of *Maynard v. Cartwright*, 486 U.S. at 360.

> This approach of reviewing the totality of circumstances surrounding the murder was rejected by the Supreme Court in *Maynard v. Cartwright*. The Tenth Circuit, in the *Maynard* opinion affirmed by the Supreme Court, held that '[c]onsideration of all the circumstances is permissible; reliance upon all the circumstances is not.' 822 F.2d 1477, 1491 (10th Cir. 1987) (*en banc*).

Moore v. Clarke, 904 F.2d at 1233. *See also Clemons v. Mississippi*, 110 S.Ct. at 1446; *Newlon v. Armontrout*, 885 F.2d 1328, 1334-5 (8th Cir.), *cert. denied* 110 S.Ct. 3301 (1990).

In sum, we can identify no possible reading of Justice Holohan's opinion that can be squared with this Court's precedents. But even if we have missed some conceivable interpretation of it that could pass muster, there is too much uncertainty about its rationale and its view of the underlying facts. At the least, there is a reasonable likelihood that the "majority" Justices failed to apply a constitutionally acceptable limiting definition of these crucial terms. Such a likelihood is sufficient to call for reversal in any criminal case. *Estelle v. Maguire*, 112 S.Ct. 475, 482 (1991). It must especially be so where life is at stake, in view of the "long-standing recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary." *Saffle v. Parks*, 110 S.Ct. 1257, 1262 (1990). *See Clemons v. Mississippi*, 110 S.Ct. at 1451; *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (concurring opinion of Justice O'Connor). Because of that, and "[b]ecause the use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty," *Stringer v. Black*, 112 S.Ct. at 1139, the judgment of the "majority" Justices cannot stand.

II.

THE CONCURRING OPINION OF TWO ARIZONA JUSTICES DEPRIVED PETITIONER OF THE INDIVIDUALIZED SENTENCING GUARANTEED HIM BY THE EIGHTH AMENDMENT.

Although they recognized the problems with the "majority's" reliance on the "heinous" aggravating circumstance, the two concurring Arizona Justices nonetheless fell into constitutional error in their decision to affirm Petitioner's death sentence.

After explaining his conclusion that "[t]his crime is . . . not above the norm of first degree murders," Justice Cameron's concurring opinion simply states "[t]he criminal record of this defendant, however, clearly places him above the norm of first degree murderers," and "[t]his history of serious violent crime justifies the imposition of the death penalty." J.A. 96. The opinion concludes: "I concur in the opinion of the majority except its finding that this crime was heinous and depraved, and I concur in the result." *Ibid.* But that concurrence cannot have extended to the "majority's" "independent review" of Petitioner's sentence; for in that review one of the facts that was "[p]articularly . . . note[d]" was the very factor the concurrence rejected, "the gruesome manner in which this murder was committed." J.A. 90.

As Justice Feldman's dissent pointed out, this was of central significance because much of the mitigating evidence went to the same issue as the aggravating circumstances which the concurring Justices left standing: the defendant's character. J.A. 96. It was for this reason

Justice Feldman emphasized his disagreement with the concurring Justices' approach:

> [I]ndependent review on the death penalty issue involves more than a determination of whether the trial court's imposition of this penalty can be supported by the record. It requires our own, independent conclusion from the record. . . . While the aggravating circumstances which were found to exist may indicate that the defendant was above the norm of murderers, the evidence of changed character is persuasive mitigation. Review of this record indicates strong evidence of rehabilitation and the probability that if allowed to live, defendant will make a contribution of some value to society.

J.A. 100 (footnote omitted).

On this point, Justice Feldman's argument is clearly correct. *Clemons v. Mississippi, supra*. A defendant's prior record, however bad, does not remove "[t]he constitutional mandate of individualized determinations in capital-sentencing proceedings." *Sumner v. Shuman*, 483 U.S. 66, 75 (1987). This Court has rejected the suggestion that "the Eighth Amendment permits the state appellate court in a weighing State to affirm a death sentence without a thorough analysis of the role an invalid aggravating factor played in the sentencing process." *Stringer v. Black*, 112 S.Ct. at 1136.

> [W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale.

Id. at 1137.

The Court of Appeals panel attempted to avoid this logic by denying that Arizona is a weighing state. J.A. 132. The validity of that position depends, of course, on the role of aggravating circumstances under state law. *Zant v. Stephens*, 456 U.S. 410 (1982); *Zant v. Stephens*, 462 U.S. 862, 873 (1983).

Arizona's statute provides that once an aggravating circumstance is found, the sentencing decision turns on whether any mitigating circumstances are "sufficiently substantial to warrant leniency." Ariz. Rev. State. § 13-703(E). Although the statute does not explicitly say that the "substantiality" of any mitigating factors depends, in part, on the number and nature of the aggravating factors found, the Arizona Supreme Court has repeatedly so held.

> [The trial judge and this] court on review . . . must determine whether the mitigating circumstances are "sufficiently substantial to call for leniency." . . . This necessarily involves the difficult weighing and balancing of the aggravating and mitigating circumstances present.

State v. Gretzler, 659 P.2d at 13.

> We have described the formula of "sufficiently substantial to call for leniency" as involving the weighing of aggravating against mitigating circumstances on the basis of the gravity of each circumstance.

State v. Harding, 137 Ariz. 278, 670 P.2d 383, 397 (1983).[19] The premise of this resentencing requirement is that different

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[19] *Accord, State v. Fierro*, 166 Ariz. 539, 804 P.2d 72, 81 (1990); *State v. Jimenez*, 165 Ariz. 444, 799 P.2d 785, 794 (1990); *State v. Serna*, 163 Ariz. 260, 787 P.2d 1056, 1065 (1990); *State v. Marlow*, 163 Ariz. 65, 786 P.2d 395, 402 (1989); *State v. Rossi*, 146 Ariz. 359, 706 P.2d 371, 379 (1985); *State v. Brookover*, 124 Ariz. 38, 601 P.2d 1322, 1326 (1979); *see also* J.A. 88.

numbers and combinations of aggravating factors carry different weights. *See State v. Schaaf*, 169 Ariz. 323, 819 P.2d 921 (1991).

Thus, the Arizona Supreme Court, "which is the final authority on the meaning of [Arizona] law, has at all times viewed its sentencing scheme as one in which aggravating factors are critical in the . . . determination whether to impose the death penalty." *Stringer v. Black*, 112 S.Ct. at 1139. The panel decision below simply misunderstood this. The Arizona Supreme Court has not accepted its mischaracterization, but has continued since the panel decision to describe its statute as requiring the weighing of aggravation against mitigation.[20]

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[20] *See, e.g., State v. Atwood*, 1992 WL 72290 (Ariz., April 9, 1992) at *75 ("Under Arizona's death penalty statute, the trial court may give aggravating weight only to that evidence which tends to establish the aggravating circumstances specifically enumerated in A.R.S. § 13-703(F). . . . "); *State v. Rossi*, 1992 WL 65714 (Ariz. April 2, 1992) at *4 ("If . . . mitigating circumstances are found to exist, they must be weighed by the court to determine whether they are 'sufficiently substantial to call for leniency.'"); *State v. Brewer*, 826 P.2d 783, 801 (Ariz. 1992) ("On appeal, our task is independently to 'review the record to determine whether any mitigating circumstances outweigh aggravating circumstances.'"); *State v. Cook*, 170 Ariz. 40, 821 P.2d 731, 751 (1991) ("We [determine whether the death sentence is appropriate] . . . by reviewing the aggravating and mitigating circumstances found by the trial court to ensure that they were properly determined and weighed."); *id.* at 756 ("[D]isparity between the sentences of the sort that occurred in

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Like most weighing states, the Arizona Supreme Court has stated that its "usual practice in a case such as this [where an aggravating factor is invalidated] is to remand to the trial court for reconsideration of the death sentence in light of our findings of aggravation and mitigation." *State v. Fierro*, 804 P.2d at 88.[21] However, it has occasionally exercised its option, under *Clemons* and *Walton*, to perform the resentencing itself. *See, e.g., State v. Brewer, supra*. But it has not changed its view of the fundamental nature of its sentencing law.

Although it uses slightly different language, that law is essentially the same kind of "weighing" statute which was involved in *Clemons* and *Stringer*. That invokes the Eighth Amendment principle reiterated in *Clemons v. Mississippi*:

> An automatic rule of affirmance in a weighing State would be invalid under *Lockett v. Ohio*, 438 U.S. 586 . . . (1978), and *Eddings v. Oklahoma*, 455

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this case must be considered and may be found as a mitigating circumstance and weighed against any aggravating circumstances, in determining whether to impose the death penalty."); *State v. Lavers*, 168 Ariz. 376, 814 P.2d 333, 348 (1991) ("we independently determine the weight given each such [aggravating and mitigating] circumstance and whether the mitigating circumstances are sufficient to outweigh the aggravating circumstances."); *id.* at 353 ("we have carefully weighed the aggravating and mitigating circumstances and have concluded that . . . the mitigating circumstances are not sufficiently substantial to call for leniency.")

[21] *See also, e.g., State v. Schaaf*, 819 P.2d at 920; *State v. Hinchey*, 165 Ariz. 432, 799 P.2d 352 (1990); *State v. Lopez*, 163 Ariz. 108, 786 P.2d 959, 963 (1990); *State v. Gillies*, 135 Ariz. 500, 662 P.2d 1007, 1023 (1983).

> U.S. 104 . . . (1982), for it would not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances. *Cf. Barclay v. Florida*, 463 U.S. 939, 958 . . . (1983).

Clemons v. Mississippi, 110 S.Ct. at 1450. Although they departed from, rather than announcing, a "rule," what the concurring Arizona Supreme Court Justices did in this case was essentially the same thing the Mississippi Supreme Court did in *Stringer*: they affirmed on the ground that "the evidence fully support-[ed] . . . statutorily required aggravating circumstances . . . and the death sentence was not disproportionate to sentences imposed in other cases." 112 S.Ct. at 1134 (internal quotations omitted). Compare J.A. 95-6. Where the judgment under review included an improper aggravating factor – and where, under state law, that factor had been weighed in the scales of life and death – that violates the Eighth Amendment.

III.

IF THERE IS CONSTITUTIONAL ERROR IN EITHER OF THE TWO ARIZONA SUPREME COURT PLURALITY OPINIONS, REVERSAL IS REQUIRED HERE.

As should be plain from the above, it is Petitioner's submission that both of the Arizona Supreme Court's plurality opinions are infected by constitutional error. But even if we are wrong on one of those points, reversal is required here.

Without the concurrence of both of these two-Justice pluralities, the outcome of this case would have been

different. Had either group applied a constitutional analysis and reached a different conclusion, together with the dissenting Justice they would have formed a majority to reverse or vacate Petitioner's sentence of death. That means both groups' errors were harmful.

In similar situations – when the votes of lower court judges necessary to make up a majority are based on a premise that is invalid under federal law – the Court has held that remand is necessary. *United Airlines v. Mahin*, 410 U.S. 623, 632 (1972).[22] Because of "the precision that individualized consideration demands under the *Godfrey* and *Maynard* line of cases," *Stringer v. Black*, 112 S.Ct. at 1137, that rule should apply with particular force in this context.

CONCLUSION

Although the Court has held that appellate judges, no less than trial judges or jurors, may be empowered to make the decision between life and death, *Clemons v. Mississippi, supra*, it has not exempted them from the requirement that such decisions be made in a manner consistent with the Eighth Amendment. Because that requirement was not met by either of the two groups of state Justices whose decision was necessary to sustain Petitioner's death judgment, that judgment must be reversed.

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[22] *Cf. Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986); *California v. Krivda*, 409 U.S. 33, 35 (1972); *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 443 (1952). *See also Hartman v. Greenhow*, 102 U.S. 672, 676 (1881) (review of decision of equally divided lower court).

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

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No. 91-7094

In The

Supreme Court of the United States

October Term, 1991

WILLIE LEE RICHMOND,

Petitioner,

vs.

SAMUEL A. LEWIS, Director, Arizona Department of Corrections; and ROGER CRIST, Superintendent of the Arizona State Prison,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. If a state appellate court does not unanimously agree about the existence of a statutory aggravating circumstance, is it violative of the federal Constitution for the justices that are in the minority on the existence of the circumstance to nonetheless consider the circumstance when they conduct their independent review of the record to determine the propriety of the death sentence?

2. When a state supreme court justice concurs in the majority opinion that includes the requirement that the state supreme court independently review the record, does the federal Constitution require a remand to the state court to determine whether that justice independently reviewed the record?

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STATUTORY AND CONSTITUTIONAL PROVISION INVOLVED

28 U.S.C. § 2254.

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

SUMMARY OF ARGUMENTS

Richmond makes two claims why his death sentence requires further review in state court. Richmond's first claim is that it was error for two justices to consider, in their independent review, the aggravating circumstance of especially heinous after three justices found the circumstance did not exist. Richmond may not obtain relief on this claim because the law as dictated by this Court in 1983 did not mandate a reviewing court to consider only those statutory aggravating factors that are found by a majority of the court. In order to accept Richmond's arguments, this Court would have to create a "new rule" in violation of *Teague v. Lane*.

The only issue properly before the Court is whether the record is sufficient to support the conclusion reached by the Arizona minority justices that Richmond committed the crime in an especially depraved manner. Under this Court's holding in *Jeffers v. Lewis*, a habeas court is to view the evidence in the light most favorable to the prosecution. A review of the record in this light supports the panel decision below that the minority justices did act in a rational manner.

The second claim raised by Richmond is that the justices who did not find the aggravating circumstance of

heinousness, failed to consider the mitigating evidence in their independent weighing of the evidence before affirming the death sentence. The Arizona Supreme Court reweighs the aggravation and mitigation in every capital case to determine if the death penalty is appropriate. Under Arizona law, the death penalty is proper only if the aggravation outweighs the mitigation. In their opinion, the justices stated that they found Richmond's death sentence to be proper, and concurred in the majority opinion. The opinion in which they concurred specifically stated that the court did an independent review, and discussed the mitigation proffered by Richmond. Such a record is sufficient for a habeas court to conclude that the mitigation was considered.

STATEMENT OF THE CASE

On August 25, 1973, Willie Richmond and his 15-year-old girlfriend, Faith Erwin, went to the Bird Cage Bar in Tucson to see their friend Rebecca Corella, a nude dancer at the bar. Corella came out of the bar with Bernard Crummett, a Vietnam veteran. The two sat in the car Richmond had driven over and talked. After a while Richmond, who had been waiting with Erwin nearby, joined the two in the car. An argument ensued between Richmond and Crummett because Crummett wanted Erwin to perform an act of prostitution with him, and Richmond refused to allow it. Corella agreed, however, to prostitute herself with Crummett for $20. Erwin then joined the three in the car and Richmond drove them to a hotel on Benson Highway in Tucson where Corella was staying. *Richmond v. Ricketts*, 640 F. Supp. 767, 770 (D. Ariz. 1986).

Richmond acted as Corella's pimp, and Corella gave him the $20 Crummett paid her in advance of the act.

Richmond switched the $20 bill for a $10 bill, then harassed Crummett about trying to give them less money. Crummett opened his wallet to pay the additional $10. Corella, apparently observing what she believed to be a large amount of money, notified Richmond that Crummett was "loaded." 640 F. Supp. at 770. Corella and Crummett then went into one of the hotel bedrooms. While they were gone, Richmond whispered to Erwin that he intended to rob Crummett, but that Erwin should not say anything.

When Corella and Crummett came out of the bedroom, all four people got back in the car. With Richmond again driving, they headed toward the west end of 22nd Street in Tucson, just west of "A" Mountain. 640 F. Supp. at 771. Upon reaching the end of the paved road, which is in a desert area, Richmond stopped the car and got out. Corella, who was in the back seat with Crummett, informed Crummett that they had a flat tire and he should get out and help. Immediately after Crummett exited the car, Richmond struck Crummett, knocking him to the ground and rendering him unconscious. Richmond then walked around to the desert on the car's passenger side and picked up some large rocks. Returning, Richmond stood directly over Crummett and threw the rocks at Crummett's head. *Id.*

The record is not clear whether it was Corella, Richmond or both who removed objects from Crummett. However, Crummett's pockets were turned inside out, and his wallet and watch were taken. Both Corella and Richmond shared in the robbery proceeds, and Richmond later threw Crummett's watch out of the car window. 640 F. Supp. at 771. Following the robbery, Corella, Richmond, and Erwin reentered the car. The car ran over

Crummett two separate times from two different directions as Crummett laid in the street. On the first pass, a car tire directly struck Crummett's head, inflicting a massive head injury that caused Crummett's death. The second pass occurred more than 30 seconds later, after Crummett's heart had already stopped beating and he had suffered massive blood loss. On the second pass, a car tire drove over Crummett's chest, causing substantial injuries. On one of the passes, the car drug Crummett's body for a short distance. The body was discovered in the street several hours later. 640 F. Supp. at 771.

Richmond was tried by a jury on charges of first-degree murder and robbery, with evidence presented of both premeditated first-degree murder and first-degree murder under the felony-murder rule. Richmond was convicted of both counts. Following an aggravation/mitigation hearing pursuant to A.R.S. § 13-454, the trial court sentenced Richmond to between 15 and 20 years on the robbery charge, and the death penalty for the murder charge. *Richmond v. Ricketts*, 640 F. Supp. at 771-72.

Under Arizona law an automatic appeal was filed directly with the Arizona Supreme Court. During its pendency, Richmond filed a petition for post-conviction relief in the trial court. The petition was denied, and Richmond sought review. The Arizona Supreme Court consolidated the two appeals and affirmed both the convictions and death sentence. *State v. Richmond*, 560 P.2d 41 (Ariz. 1976). This Court denied Richmond's petition for certiorari. *Richmond v. Arizona*, 433 U.S. 915 (1977).[1]

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[1] During the pendency of the automatic appeal, Richmond was convicted of a prior charge of first degree murder for

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Richmond then petitioned for a writ of habeas corpus in federal district court challenging both his murder conviction and death sentence. The district court affirmed the conviction, but invalidated the death sentence, ruling the state statute as written violated the Constitution by limiting to four the number of mitigating factors that a defendant could present to the sentencing judge. *Richmond v. Cardwell*, 450 F. Supp. 519 (D. Ariz. 1978). Both Richmond and the State appealed that decision. Shortly thereafter, the Arizona Supreme Court also found Arizona's death sentencing statute unconstitutional for the same reasons. In that opinion, the court severed the unconstitutional limitation on mitigation, held that a defendant could present anything relevant in mitigation, and affirmed the remainder of the statute. *State v. Watson*, 586 P.2d 1253 (Ariz. 1978), *cert. denied*, 440 U.S. 924 (1979). Following this decision, the Arizona Supreme Court vacated every pending Arizona death sentence, including Richmond's, and remanded each case to the superior court for a resentencing where the defendant could present any relevant mitigation. The Ninth Circuit remanded the case to the district court pending the resentencing. The district court ruled in Richmond's favor. The Ninth Circuit later affirmed a subsequent district court ruling that the Arizona Supreme Court properly interpreted the Arizona statute and properly ordered the resentencings. *Knapp v. Cardwell*, 667 F.2d 1253 (9th Cir.), *cert. denied*, 459 U.S. 1055 (1982) (affirming 513 F. Supp. 4 (D. Ariz. 1980),

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which he received a life sentence. The homicide in that case occurred before the effective date of the Arizona death sentencing statute, so that penalty was not available. *See State v. Richmond*, 540 P.2d 700 (Ariz. 1975).

a class action for all Arizona death row inmates). In the meantime, the district court denied those of Richmond's claims that were not contained in the class action, and Richmond did not appeal.

Following an evidentiary hearing in March, 1980, the Arizona trial court found the existence of three aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency, and resentenced Richmond to death. Once again, an automatic appeal was filed with the Arizona Supreme Court. *Richmond v. Ricketts*, 640 F. Supp. at 772. During the pendency of the second appeal, Richmond filed a second petition for post-conviction relief, claiming that the statute was being discriminatorily applied to him based on his race (black) and his poverty. The trial court summarily denied the petition, and Richmond filed for review with the Arizona Supreme Court. The supreme court consolidated the two actions, and affirmed the sentence of death by a divided court. *State v. Richmond*, 666 P.2d 57 (Ariz. 1983). Raising various constitutional issues, Richmond moved for rehearing before the Arizona Supreme Court but that court refused to reconsider its decision. This Court again denied Richmond's petition for certiorari. *Richmond v. Arizona*, 464 U.S. 986 (1983).

Richmond filed a third petition for post-conviction relief in the state trial court, raising many of the same grounds presented in the motion for rehearing before the Arizona Supreme Court. The trial court summarily denied this petition, and the Arizona Supreme Court declined review. *Richmond v. Ricketts*, 640 F. Supp. at 773. Richmond then filed this third habeas corpus petition shortly before his scheduled execution date.

Richmond claimed that his Sixth and Eighth Amendment rights were violated when the state supreme court

affirmed his death sentence after overturning the trial court's finding that the crime was committed in an especially cruel and heinous manner. *Richmond v. Ricketts*, 640 F. Supp. at 796. The district court rejected the claim finding:

> The aggravating circumstances found present in this case are according to the Arizona Supreme Court's opinion very heavily weighted. One of the aggravating circumstances found in this case is that Richmond has been convicted and sentenced for another first degree murder, entirely separate from the killing in this case. This court has already held that there was no abuse of discretion in the weight given to the mitigating circumstances here.
>
> The state court record indicates that the state supreme court conducted a careful and thorough review of the issues in this case. This court therefore concludes that even though the Arizona Supreme Court reversed one of the aggravating circumstances found in this case, it was not a denial of due process under the sixth or eighth amendments to not send the case back for another sentencing.

640 F. Supp. at 796. Richmond appealed from the district court's decision.

After this Court rendered its decision in *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047 (1990), Richmond filed a supplemental brief in the Ninth Circuit contending that the finding by the two Arizona Supreme Court justices that his crime was "depraved" rendered his sentence unconstitutional under *Godfrey v. Georgia*, 446 U.S. 420 (1980). (Supplemental Brief at 5-6.) Richmond also argued that the concurring justices who found the statutory aggravating circumstance did not exist erred by not independently reweighing the "sufficiency of the mitigating evidence in this case." (*Id.* at 10.) The Ninth Circuit Court

of Appeals rejected Richmond's claim that the two minority justices who found the existence of the heinous aggravating circumstance could not use that factor to affirm Richmond's death sentence.

> The fact that a majority of the court did not concur in this finding [existence of heinousness under (F)(6)], however, does not deny that the Justices who did concur in it provided an adequate limiting construction. The relevant point is that members of the court who premised their votes on the challenged factor undertook the deliberations and analysis constitutionally required.

(J.A. at 125, n.9.) Regarding Richmond's claim that two of the justices had not independently weighed the mitigation, the court of appeals found that Arizona was not a "weighing" state, and therefore did not address the specifics of the argument. (J.A. at 130-32.) This petition for certiorari followed.

ARGUMENTS

I. WHEN A STATE APPELLATE COURT DOES NOT UNANIMOUSLY AGREE ABOUT THE EXISTENCE OF A STATUTORY AGGRAVATING CIRCUMSTANCE, IT DOES NOT VIOLATE THE CONSTITUTION FOR THE MINORITY JUSTICES TO NONETHELESS CONSIDER THAT CIRCUMSTANCE WHEN THEY CONDUCT THEIR INDEPENDENT REVIEW OF THE RECORD TO DETERMINE THE PROPRIETY OF THE DEATH SENTENCE.

Once again an Arizona capital defendant seeks review of the Arizona Supreme Court's application of the aggravating circumstance of "especially heinous, cruel or depraved." *See Lewis v. Jeffers*, 497 U.S. 764, 110 S. Ct. 3092 (1990); *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047 (1990). However, unlike the previous cases, the majority

of the Arizona Supreme Court in this case found that the circumstance did not exist. (J.A. at 92-96, 96, Cameron and Gordon concurring, Feldman dissenting.) Richmond claims that the two justices who found that the facts constituted a statutory aggravating circumstance improperly relied on the circumstance in conducting their independent review of the record and affirming Richmond's death sentence. For the reasons discussed below, the Arizona Supreme Court correctly applied the constitutional principles in effect at the time of its decision, and Richmond is not entitled to relief.

A. A Federal Habeas Corpus Court's Review Is Limited to the Specific Constitutional Requirements Dictated at the Time the Defendant's Conviction Became Final on Direct Appeal in the State Court. At the Time That Richmond's Direct Appeal Became Final, There Was No Constitutional Requirement Prohibiting a State Court Justice From Considering Upon Independent Review an Aggravating Circumstance Vacated by a Majority of the Court. In Order To Accept Richmond's Arguments, This Court Would Have To Create a New Rule, Which Would Violate *Teague v. Lane*.

Richmond contends that it was error for two of the justices of the Arizona Supreme Court to consider the "heinous" aggravating circumstance in their independent review, when the three other justices found the circumstance did not exist. (Opening Brief at 30-36.) The error, argues Richmond, is that, to consider the circumstance, the minority would have had to construe the statutory aggravating circumstance beyond the legal and factual limitations found to exist by the majority of the court. (*Id.* at 34-35.) Richmond's argument assumes that the Constitution mandates unanimity, or at least a majority vote, by

the state court justices concerning the existence of an aggravating circumstance before a death penalty may be affirmed. Richmond's assertions concerning the facts necessary to affirm the circumstance are incorrect, and the rule of law and relief Richmond seeks would create a "new rule" in violation of the law set forth in *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989) (plurality opinion).[2]

1. The law set forth in *Teague v. Lane* prohibits a habeas court from granting relief if to do so would create a "new rule."

As a threshold matter, this Court always determines first if the relief the habeas corpus petitioner seeks would create a "new rule." *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 2944 (1989) (citing *Teague v. Lane*, 109 S. Ct. at 1069). A state prisoner seeking habeas corpus relief in federal court cannot benefit from a "new rule." *Id.* A

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[2] This *Teague* argument was not presented in the response to the petition for certiorari. The argument is not waived, however, because the *Teague* "threshold question" is one this Court addresses in all collateral review cases unless the Court, in the exercise of its jurisdiction, accepts the State's affirmative waiver of the retroactivity issue. *Collins v. Youngblood*, 497 U.S. 37, 110 S. Ct. 2715, 2718 (1990). The State would note that the issue of retroactivity found to be dispositive was not raised or argued by the parties in either *Teague* or *Penry*. *Teague*, 109 S. Ct. at 1084 (Brennan, J., dissenting); *Penry*, 109 S. Ct. at 2959 (Brennan, J., concurring in part, dissenting in part). Also, a respondent may defend the judgment of the court of appeals on any ground supported by the record. *Lewis v. Jeffers*, 110 S. Ct. 3092, 3105 (1990) (Blackmun, J., dissenting); *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982). The State believes it is important for this Court to consider the *Teague* claim in reviewing this case, which has been in the federal system for fast approaching 10 years.

"new rule" arises when the relief sought "breaks new ground or imposes a new obligation on the states." *Penry*, 109 S. Ct. at 2944; *Teague*, 109 S. Ct. at 1070. A "new rule" is imposed if "the result was not *dictated* by precedent" existing at the time the prisoner's conviction became final. *Penry*, 109 S. Ct. at 2944 (emphasis in original); *Teague*, 109 S. Ct. at 1070. The rationales for the "new rule" jurisprudence – finality, predictability, and comity – are undermined "to an equal degree by the invocation of a rule that was not dictated by precedent as by the application of an old rule in a manner that was not dictated by precedent." *Stringer v. Black*, ___ U.S. ___, 112 S. Ct. 1130, 1135 (1992); *Butler v. McKellar*, 494 U.S. 407, 110 S. Ct. 1212, 1214 (1990). The only exceptions to the "new rule" doctrine occur if (1) the sought-after rule places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or (2) the procedures at issue "implicate the fundamental fairness of the trial." *Teague*, 109 S. Ct. at 1075-76. Neither of the exceptions is implicated by Richmond's arguments, so they will not be addressed by the State.

2. At the time Richmond's sentence became final, no United States Supreme Court precedent "dictated" the result Richmond now seeks.

For *Teague* purposes, Richmond's case became final on November 14, 1983. *Richmond v. Arizona*, 464 U.S. 986 (1983). By that date, this Court had issued four opinions that are relevant to the issues raised in this case – *Godfrey v. Georgia*; *Zant v. Stephens*, 462 U.S. 862 (1983); *Barclay v. Florida*, 463 U.S. 939 (1983); and *California v. Ramos*, 463

U.S. 992 (1983).[3] The determination whether the Arizona Supreme Court correctly applied the law to Richmond requires a review of this Court's cases prior to November 14, 1983.

In *Godfrey*, a plurality of this Court invalidated a death sentence that was based solely on the aggravating circumstance that the killing was "outrageously or wantonly vile, horrible and inhuman." 446 U.S. at 428-29. The jurors in *Godfrey* had not been given a limiting instruction regarding the circumstance, and the limiting application of the circumstance by the Georgia Supreme Court in that case was deemed vague and imprecise, causing arbitrary and capricious application of the death penalty, in violation of the Eighth Amendment. *Id.* Because the challenged aggravating circumstance was the *only* aggravating circumstance found by the jurors, the death penalty was vacated.

In *Stephens*, the Georgia Supreme Court determined that Georgia's "substantial history of serious assaultive criminal convictions" aggravating circumstance was unconstitutionally vague. 462 U.S. at 867. The Georgia Supreme Court therefore set aside the jurors' finding regarding that circumstance, but nonetheless affirmed Stephens' death sentence based on two remaining valid aggravating circumstances. *Stephens v. State*, 227 S.E.2d 261, 263 (Ga.), *cert. denied*, 429 U.S. 986 (1976). This Court ultimately granted certiorari to determine whether a death sentence must be vacated if one of the aggravating

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[3] The Arizona Supreme Court denied Richmond's motion for rehearing on June 28, 1983, 6 days after this Court issued *Zant v. Stephens*. On the date of the denial of rehearing, this Court had not issued *Barclay v. Florida* or *California v. Ramos*, both decided on July 6, 1983.

circumstances found by the jurors is set aside on appeal. 462 U.S. at 864. This Court held that the answer depended on two things: first, the function of aggravating factors under state law and, second, the reason why the aggravating factor was determined to be invalid. 462 U.S. at 864.

Under the Georgia capital sentencing scheme, aggravating factors merely narrow the class of persons eligible for the death penalty; they play no other role in the sentencing determination. 462 U.S. at 872-73. This Court reaffirmed Georgia's sentencing scheme, noting:

> Our cases indicate . . . that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.

462 U.S. at 878-79 (emphasis in original). This Court noted that, to set aside a "vague" aggravating circumstance on appeal did not, under the Georgia sentencing scheme, necessarily render the death sentence constitutionally infirm. A reversal would be required only if the State's evidence supporting the circumstance would have been inadmissible for jury consideration without the circumstance, or if the circumstance was held invalid to protect constitutionally protected conduct. 462 U.S. at 885-86. Finding neither in *Stephens*, the Court affirmed the sentence, and specifically declined to determine if its analysis would change if the state statutory scheme specifically instructed the sentencing judge or jurors to weigh

statutory aggravating circumstances against mitigation. 462 U.S. at 890.

The question left open in *Stephens* was resolved in *Barclay v. Florida*. In *Barclay*, the advisory sentencing jury recommended 7-5 that Barclay receive a life sentence. 463 U.S. at 944. The trial court found various statutory and nonstatutory aggravating factors and no mitigating factors. Based on these findings, it rejected the jurors' recommendation of a life sentence, and imposed death. *Id.* at 944-45. The Florida Supreme Court affirmed, and this Court granted certiorari to determine whether the death penalty could be imposed if the sentencer, in violation of state law, considered a nonstatutory aggravating circumstance. *Id.* at 941-42.

Justice Rehnquist, writing for a plurality of the Court, stated that the resolution of the question revolved around the "function of the finding of aggravating circumstances under Florida Law and on the reason why this aggravating circumstance is invalid." *Id.* at 951. Justice Rehnquist noted that Florida law differed materially from the Georgia statute reviewed in *Stephens*.

> Thus the Florida statute, like the Georgia statute at issue in *Zant v. Stephens*, . . . requires the sentencer to find at least one valid statutory aggravating circumstance before the death penalty may even be considered, and permits the trial court to admit any evidence that may be relevant to the proper sentence. Unlike the Georgia statute, however, *Florida law requires the sentencer to balance statutory aggravating circumstances against all mitigating circumstances and does not permit nonstatutory aggravating circumstances to enter into this weighing process.*

Id. at 954 (emphasis added, citation omitted). As in *Stephens*, the plurality opinion noted that the evidence supporting the nonstatutory aggravating circumstance was

otherwise admissible, and the trial court had not improperly based its decision on constitutionally protected activity. *Id.* at 956. Therefore, the plurality concluded that the crux of the issue was whether the trial court's consideration of the improper aggravating circumstance so infected the balancing process created by the Florida statute that Barclay's sentence could not stand. *Id.*

Noting that there was no "constitutional defect in a sentence based on both statutory and nonstatutory aggravating circumstances," the plurality affirmed the death sentence. 463 U.S. at 957. Whether the Florida Supreme Court had misapplied its own law in affirming Barclay's death sentence was a mere error of state law; and even if true, "mere errors of state law are not the concern of this Court." *Id.* Finally, the plurality rejected Barclay's claim that a remand was required, noting:

> There is no reason why the Florida Supreme Court cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstances could not possibly affect the balance. . . . "What is important . . . is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime."

Id. at 958 (citing *Zant v. Stephens*, 462 U.S. at 879 (emphasis in original)).

Justice Stevens, joined by Justice Powell, concurred in the result, but differed on the constitutional analysis required to review a state supreme court's decision. Justice Stevens opined that Florida law prohibited the use of nonstatutory aggravating circumstances, and that "evidence supporting nonstatutory factors simply may not be introduced into evidence at any stage in the sentencing proceeding." 463 U.S. at 965. He found that the Florida rule prohibiting the use of nonstatutory factors afforded

greater protection to the accused than the federal Constitution required. The federal Constitution allows consideration, at the selecting phase, of information not directly related to statutory aggravating or statutory mitigating factors, as long as the information relates to the character of the defendant or the circumstances of the crime. *Id.* at 967.

Justice Stevens rejected Barclay's claims that the death sentence findings violated *Godfrey*:

> We need not decide whether the principles of *Godfrey* have been violated . . . because other statutory aggravating circumstances are valid. In contrast, in *Godfrey*, once the "broad and vague" aggravating circumstance was struck down, no valid statutory aggravating circumstances remained.

463 U.S. at 969 n.16. Justice Stevens' analysis was the same even if the jurors had found mitigation. 463 U.S. at 967 n.13. As long as the federal Constitution did not bar introduction of the evidence underlying the invalid factor, the state law error did not require that the death penalty be set aside. *Id.*

In *California v. Ramos*, 463 U.S. 992 (1983), this Court addressed whether, during the sentencing phase of a capital trial, the jurors could be informed that the governor could commute or modify a life sentence. 463 U.S. at 995-96. This Court noted that, unlike the guilt/innocence phase of a trial, the penalty phase involves no "central issue." *Id.* at 1008. Rather, once the jurors find that the defendant falls within the legislatively defined category of persons eligible for the death penalty, the jurors then may consider all relevant factors to determine whether death was the appropriate punishment. *Id.* The jurors' choice between life and death must be individualized, "[b]ut the constitution does not require the jury to ignore

other possible factors in the process of selecting . . . those defendants who will actually be sentenced to death." *Id.* at 1008 (citing *Zant v. Stephens*, 462 U.S. at 878).

For *Teague* purposes, after *Godfrey*, *Stephens*, *Barclay*, and *Ramos*, the law "dictated" to apply in Richmond's case can be succinctly summarized: First, the Constitution requires that facially vague aggravating circumstances be sufficiently limited. *Godfrey*, 446 U.S. at 428-29. Second, the invalidation on appeal of one of many aggravating circumstances would not necessarily violate the Constitution unless the evidence presented at the selection stage would have been different but for the invalid circumstance, *Stephens*, 462 U.S. at 885-86; *Barclay*, 463 U.S. at 956 (plurality), 463 U.S. at 967 n.13 (Stevens, J., concurring), or the aggravating circumstance was set aside because the factor was based on constitutionally protected activity. *Stephens*, 462 U.S. at 885-86. Third, even in weighing states, the Constitution does not prohibit the sentencer from considering nonstatutory aggravating circumstances in the selection process. *Barclay*, 463 U.S. at 957 (plurality); 463 U.S. at 967 n.13 (Stevens, J., concurring). Fourth, a mere error in the application of state law does not mandate the reversal of a death sentence. *Barclay*, 463 U.S. at 957; *accord Wainwright v. Goode*, 464 U.S. 78, 86 (1983) (mere error of state law regarding applicability of nonstatutory aggravation does not create constitutional violation). Fifth, in a weighing state, a state supreme court may examine the balance between aggravation and mitigation after vacating an invalid circumstance and affirm a death sentence. *Barclay*, 463 U.S. at 958 (plurality). And Sixth, once a capital defendant falls within the legislatively defined category of persons eligible for the capital sentence, the selection must be

"individualized." Ramos, 463 U.S. at 1008; *Barclay*, 463 U.S. at 958; *Stephens*, 462 U.S. at 879 (emphasis in original).

3. The law of Arizona and its application in this case indicate that the Arizona Supreme Court comported with *Godfrey, Stephens, Barclay* and *Ramos*.

A review of the Arizona procedures and the Arizona Supreme Court's opinion shows that Arizona clearly comported with these dictates even though the state court opinion issued prior to this Court's decisions.[4] A.R.S. § 13-703(E) provides:

> In determining whether to impose a sentence of death or life imprisonment . . . the court shall take into account the aggravating and mitigating circumstances included in subsections F [aggravation] and G [mitigation] of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

[4] The State realizes that to believe that the Arizona Supreme Court actually applied all of these cases in its *Richmond* opinion is a legal fiction, because only *Godfrey* was issued at the time it rendered its decision. While the *Stephens* opinion issued 6 days prior to the Arizona Supreme Court's denial of Richmond's motion for reconsideration, Richmond did not bring it to the court's attention, even though he had cited in his motion for rehearing this Court's certified question in *Zant v. Stephens*, 456 U.S. 410 (1982). (Motion for Rehearing, filed June 7, 1982, at 5.) Likewise, Richmond raised his contention that the two minority judges had erred in relying on (F)(6) in his petition for certiorari, but cited neither *Stephens* nor *Barclay* as controlling. (*Richmond v. Arizona*, No. 83-5499, Pet. for Cert. at 5-14.) To allow Richmond to argue that *Stephens* and *Barclay* dictated the result he now seeks would be the height of arbitrariness because Richmond did not even believe they controlled his case in 1983.

A.R.S. § 13-703(F) provides a specific list of aggravating circumstances to be considered in capital sentencing decisions, and further requires the trial court to consider any relevant mitigating evidence in determining whether to impose a death sentence. *State v. Gretzler*, 659 P.2d 1, 12-13 (Ariz. 1983). When none of the statutory aggravating circumstances is found, the statute prohibits the death penalty. *Id.*; *State v. Madsen*, 609 P.2d 1046, 1053 (Ariz.), *cert. denied*, 449 U.S 873 (1980). When one or more of the statutory aggravating circumstances is found, and no mitigation exists, the statute requires the death penalty to be imposed. *State v. Jordan*, 672 P.2d 169, 173 (Ariz. 1983); *State v. Gretzler*, 659 P.2d at 12. When both aggravating and mitigating circumstances are found in a given case, however, the trial court must determine whether the mitigating circumstances are "sufficiently substantial to call for leniency." A.R.S. § 13-703(E); *State v. Gretzler*, 659 P.2d at 13. The balancing procedure is not a mechanistic determination of the number of aggravating and mitigating circumstances presented, but instead requires the trial court to determine and compare the "gravity" of the circumstances found. *State v. Gretzler*, 659 P.2d at 13.

As an additional safeguard, the Arizona Supreme Court conducts a de novo review of the trial court's determinations. *State v. Rockwell*, 775 P.2d 1069, 1079 (Ariz. 1989); *State v. Gretzler*, 659 P.2d at 14; *State v. Richmond*, 560 P.2d at 51. On mandatory appeal, the Arizona Supreme Court does not review the record merely to determine if the trial court "properly imposed the death penalty," but also determines whether *it* believes "that

the death penalty should be imposed." *State v. Rockwell*, 775 P.2d at 1080 (citing *State v. Watson*, 628 P.2d 943, 946 (Ariz. 1981)). In conducting its independent review, the Arizona Supreme Court balances "all relevant factors" against the aggravating circumstances to determine whether the death sentence should be imposed, resolving all doubt against imposition of the death penalty. *State v. Rockwell*, 775 P.2d at 1079-80; *State v. Marlow*, 786 P.2d 395, 402 (Ariz. 1989) (citing *State v. Valencia*, 645 P.2d 239, 241 (Ariz. 1982)).

In Richmond's first appeal to the Arizona Supreme Court, that court set forth its standard of review as follows:

> It has been our policy not to disturb the sentence imposed by the trial court, absent a clear abuse of discretion, when it is within the statutory limits. . . . However, the gravity of the death penalty requires that we painstakingly examine the record to determine whether it has been erroneously imposed. . . . Furthermore, because A.R.S. § 13-454 [renumbered now as § 13-703] sets out the factors which must be found and considered by the sentencing court, we necessarily undertake an independent review of the facts that establish the presence or absence of aggravating and mitigating circumstances. . . . We must determine for ourselves if the latter outweigh the former when we find both to be present.

(J.A. at 61, citations omitted.) On appeal from the resentencing, the Arizona Supreme Court again set forth that court's standard of review:

> The sentencing statute, A.R.S. § 13-703, provides that the death penalty shall be imposed if the court finds one or more aggravating circumstances and "there are no mitigating circumstances sufficiently substantial to call for leniency." In death penalty cases, this court will conduct an independent examination of the record to determine for ourselves the presence or absence of aggravating and mitigating circumstances and the weight to give each. We also independently determine the propriety of the sentence.

(J.A. at 88.)

In conducting its independent review, the court divided on various aspects of the case. Justice Holohan, writing for himself and Justice Hays, found that the trial court had correctly found three aggravating circumstances: (1) Richmond had a prior murder conviction in which a life sentence was imposed (A.R.S. § 13-703(F)(1)); (2) Richmond had prior felony convictions involving violence – armed kidnapping and murder (A.R.S. § 13-703(F)(2)); and (3) the offense was committed in an especially heinous manner (A.R.S. § 13-703(F)(6)). (J.A. at 88-89.) In addressing Richmond's claimed mitigation, Justice Holohan noted that the trial court had correctly found the following mitigating circumstances: first, Rebecca Corella and Faith Erwin were both involved in the crime but were never charged; second, the victim had been engaged in an illegal act of prostitution with Corella prior to being murdered and had also solicited an act of prostitution with Erwin, a minor; third, the jurors had been instructed regarding felony murder; and finally, Richmond's family was supportive of him and would suffer grief if the death penalty was carried out. (J.A. at 88-89.) Justice Holohan then reviewed Richmond's claim of changed character.

> The trial court did consider evidence regarding appellant's change in character, but was unable to make a definitive finding on the matter. In *State v. Watson* (II), [628 P.2d 943 (Ariz. 1981)], we held that evidence revealing a

> substantial improvement of a defendant's character could be viewed as a mitigating factor. In the case at bench the trial court was not convinced that appellant's character had changed. We do not believe this position was unreasonable. The trial court was able to observe appellant at the resentencing hearing and listen to his testimony. The trial court was also aware appellant had been in a very controlled environment while his alleged change of character took place, with much to gain from his good behavior. Additionally the judge had evidence before him of the lifestyle appellant led before his incarceration, including the fact he was involved in another murder. These facts cast sufficient doubt upon appellant's veracity so the trial court could reasonably decline to find the proffered evidence to be a mitigating factor. The court further found that there were no mitigating circumstances sufficiently substantial to call for leniency.

(J.A. at 89-90.) Thereafter, Justice Holohan concluded "[w]e believe the mitigation offered by appellant is not sufficiently substantial to outweigh the aggravating circumstances." (J.A. at 90.)[5]

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[5] Richmond challenged the Arizona courts' handling of his changed-character evidence in his habeas corpus petition. The district court noted that Richmond had improved his communication skills and had developed religious beliefs. *Richmond v. Ricketts*, 640 F. Supp. at 795. The district court rejected the claim that Richmond had changed his character, however:

> [Richmond] had *always* been concerned about his family and friends and had been very helpful to them. Despite this, Richmond participated in the murder of two people, a robbery and a kidnapping. The prison officials that testified considered him to be well behaved but could not state what would

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Justice Cameron, writing for himself and Justice Gordon, stated that he agreed that the death penalty was "properly imposed in this case," but disagreed that the crime was "especially heinous and depraved." (J.A. at 92.) Justice Cameron rejected Justice Holohan's determination that "infliction of gratuitous violence on the victim" and "needless mutilation" existed. (*Id.* at 93.) Justice Cameron found, however, that Richmond's history of serious violent crime clearly placed him above the norm of first-degree murderers and therefore concurred in Justice Holohan's opinion except for the heinous finding. (*Id.* at 95-96.)

Justice Feldman, writing only for himself, dissented. He agreed with Justices Cameron and Gordon that the crime was not "heinous and depraved." (J.A. at 96.) Therefore, he concluded that the "imposition of the death penalty in this case is clearly based upon the character of the defendant." (*Id.*) Upon his reading and consideration of the record, and materials not presented to the trial court,[6] Justice Feldman concluded that Richmond's

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> happen if he were not guarded when he was out of his cell or released into the general prison population. . . .
>
> Richmond therefore failed to present sufficient evidence in support of his claim that his character had changed. The decision to give this little or no weight as a mitigating factor calling for leniency is not an abuse of discretion nor did it violate Richmond's constitutional rights.

640 F. Supp. at 795. The court of appeals did not address the weight or sufficiency of Richmond's changed-character evidence.

[6] Justice Feldman relied on the opinion of Charles Doss, another former death row inmate [*State v. Doss*, 568 P.2d 1054

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changed-character evidence "tips the balance strongly in favor of reducing [Richmond's] sentence to life imprisonment." (*Id.*)[7]

The application of the six points of law recognized by this Court at the time of the Arizona Supreme Court's decision indicates that the court complied with those constitutional principles. Prior to issuing Richmond's opinion, the Arizona Supreme Court specifically recognized the applicability of *Godfrey* to the Arizona sentencing procedures. *State v. Gretzler*, 659 P.2d at 9. In *Richmond*, the Court applied the *Gretzler* factors, but simply disagreed whether they existed factually in this case. (J.A. at 86-87, 92-93, 96.) By rejecting the existence of the (F)(6) circumstance, the majority of the Arizona Supreme Court did not create a situation where evidence was then impermissibly introduced into the selection process of the sentencing procedures. All of the evidence considered by the minority justices on this point was produced at trial and the State offered no new evidence at the sentencing

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(Ariz. 1977)], who wrote an editorial in *La Roca*, the Arizona State Prison newspaper, that Richmond's attitude and actions had substantially changed in the 10 years he had been on death row. This information had not been presented to the trial court and was outside the record on appeal. (J.A. at 99, n.1.); Rule 31.8, Ariz. R. Crim. P.

[7] Throughout Justice Feldman's opinion, he claims that the evidence before him was "uncontradicted," "unimpeached," "unrebutted," and "uncontested." (J.A. at 98-99.) A cursory review of the record indicates the reason why there was little empirical evidence to rebut or refute Richmond's assertions: Each time the State attempted to cross-examine Richmond's witnesses concerning evidence that would contradict his assertions, the trial court sustained Richmond's objections. (R.T. of Mar. 12, 1980, at 162, 174, 178.)

hearing to establish the (F)(6) circumstance. Likewise, the circumstance was not stricken because it improperly encroached on constitutionally protected activity. *See, e.g., Dawson v. Delaware*, ___ U.S. ___, 112 S. Ct. 1093 (1992).

That a majority of the Arizona Supreme Court found that the facts of the crime did not support the *statutory* circumstance does not necessarily preclude consideration of the facts of the crime in the selection phase of sentencing. The minority's consideration of the facts of the crime may be construed at most as being influenced by a *non-statutory* circumstance in their independent review, and would not be grounds for reversal under the Constitution as long as other, valid, aggravating circumstances existed. *Barclay*, 463 U.S. at 957 (plurality); 463 U.S. at 967 n.13 (Stevens, J., concurring).

Whether or not Arizona's sentencing procedures allow for the consideration of nonstatutory aggravating circumstances in the selection phase has not been definitively decided. The Arizona Supreme Court has stated on numerous occasions that the death penalty may be imposed only if the State proves at least one statutory aggravating circumstance. *State v. Gretzler*, 659 P.2d at 13. The court has held repeatedly, however, that once the State proves a valid aggravating circumstance, the trial court must consider all relevant evidence to determine the "propriety of imposing a death sentence in the particular case." *State v. Rockwell*, 775 P.2d at 1078; *State v. Lavers*, 814 P.2d 333, 352 (Ariz.), *cert. denied*, 112 S. Ct. 343 (1991); *State v. Ortiz*, 639 P.2d 1020, 1034 (Ariz. 1981), *cert. denied*, 456 U.S. 984 (1982) (trial court needs to be informed of "all relevant evidence" to make an "individualized decision"). In making the sentencing decision, the sentencing authority "should be well informed of the circumstances of the offense and the character, record, and propensities of the offender." *State v. Brewer*,

___ Ariz. ___, 826 P.2d 783 (1992); *Richmond v. Cardwell*, 450 F. Supp. 519, 521 (D. Ariz. 1978).[8] However, assuming arguendo that the two Arizona Supreme Court justices violated state law in considering *nonstatutory* aggravating evidence in determining whether the death penalty was appropriate, mere error of state law does not lie in a federal habeas corpus proceeding. *Estelle v. McGuire*, ___ U.S. ___, 112 S. Ct. 475 (1991); *Lewis v. Jeffers*, 110 S. Ct. at 3103 (determination of whether facts exist to support aggravating circumstance is a matter of state law not "cognizable in federal habeas proceedings"); *Barclay*, 463 U.S. at 957-58. Thus, even if Richmond is correct on this aspect of his claim, he is not entitled to relief.

Like *Barclay*, in his motion for rehearing before the Arizona Supreme Court, Richmond argued that only the trial court could engage in reweighing after the appellate court set aside an aggravating circumstance. (Motion for Rehearing at 5-6, filed June 7, 1983.) Richmond's argument was unavailing given the plurality opinion in

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[8] The consideration of aggravating evidence not set forth in the statute is called, in most Arizona Supreme Court opinions, rebuttal to mitigation. Under A.R.S. § 13-703(C), however, once the State proves at least one valid statutory aggravating circumstance, the defendant must produce some mitigation or the death penalty must be imposed. *Gretzler*, 659 P.2d at 13. Once some mitigation is proffered by the defendant, the sentencing body must consider any evidence relevant to the nature and circumstances of the crime, or the character and background of the accused, to determine the propriety of the death penalty. *Rockwell*; *Lavers*; *Ortiz*; *Brewer*. Regardless whether one places a "non-statutory aggravation" or "rebuttal" title on the evidence, the sentencing body considers the evidence in the balance as either strengthening the aggravation or weakening the mitigation. Under either definition, the outcome is the same.

Barclay that the state supreme court could conduct such reweighing. 463 U.S. at 958.

Finally, in reviewing the record, Justice Holohan's opinion specifically considered all of the mitigation proffered by Richmond, and concluded, "We believe the mitigation offered by appellant is not sufficiently substantial to outweigh the aggravating circumstances." (J.A. at 88-90.) As dictated by *Ramos*, *Barclay*, and *Stephens*, the four members of the court who voted to affirm individually considered all mitigation and were not persuaded that it warranted leniency. Justices Holohan and Hays based this conclusion on the fact it was not Richmond's first murder conviction and the manner in which the murder was committed. (J.A. at 90.) Justices Cameron and Gordon based their conclusion on Richmond's criminal record alone. (J.A. at 95-96.) Under both decisions, the four justices properly gave Richmond an *"individualized"* review and determined that death was appropriate. The dictates of *Ramos*, *Barclay*, and *Stephens* were satisfied.

4. This Court's holdings in *Stringer v. Black*, *Parker v. Dugger*, and *Sochor v. Florida* do not alter the *Teague* analysis in this case.

In making the *Teague* argument above, the State of Arizona is well aware of this Court's holdings in *Stringer v. Black*, *Parker v. Dugger*, ___ U.S. ___, 111 S. Ct. 731 (1991), and *Sochor v. Florida*, 60 U.S.L.W. 4486 (June 8, 1992). In *Stringer*, this Court was asked to determine whether *Clemons v. Mississippi*, 494 U.S. 738 (1990), or *Maynard v. Cartwright*, 486 U.S. 356 (1988), created a "new rule" for cases decided prior to *Clemons*. 112 S. Ct. at 1133. This Court held that the principles from *Godfrey* and *Stephens* clearly dictated that a "weighing" state give

sufficient limiting definition to a facially vague aggravating circumstance. 112 S. Ct at 1136. Likewise, this Court found that, after *Barclay*, an appellate court in a weighing state could not be "permitted to apply a rule of automatic affirmance to any death sentence supported by multiple aggravating circumstances." 112 S. Ct. at 1137. Because the Mississippi Supreme Court *had not* applied a limiting definition for its "especially heinous" aggravating circumstance, and *had* engaged in automatic affirmances for sentencing error where there were multiple aggravating circumstances, this Court reversed. *Id.* at 1140.

Unlike Mississippi's Supreme Court, the Arizona Supreme Court correctly recognized the applicability of *Godfrey* to the Arizona sentencing procedures. *Gretzler*, 659 P.2d at 9. Likewise, the Arizona Supreme Court has never engaged in automatic affirmances in capital cases, and has always reweighed mitigation and aggravation on appeal. (J.A. at 61, 88.)[9] Richmond's contentions extend

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[9] The Arizona Supreme Court instituted the practice not as a measure to salvage death sentences, but as a means to ensure the correct application of its sentencing laws. (J.A. at 60-61, 88-89.) Although the Arizona Supreme Court did not have the opportunity to apply *Clemons* and *Barclay* in the context of the arguments Richmond now makes, the court has indicated in other cases its belief that its reweighing practice comports with these cases. *State v. Robinson*, 796 P.2d 853, 862 (Ariz. 1990), *cert. denied*, 111 S. Ct. 1025 (1991) (elimination of an aggravating factor does not require remand for resentencing when record compels the finding, citing *Clemons*); *State v. McCall*, 677 P.2d 920, 933-35, 934 n.4 (Ariz.), *cert. denied*, 467 U.S. 1220 (1984) (when mitigation is insufficient, finding that trial court relied on improper aggravating circumstance does not mandate a new sentencing, citing *Barclay*); *see also State v. Emery*, 688 P.2d 175, 179 (Ariz. 1984) (judicial economy does not require a remand in cases where to do so would be "inefficient if not futile").

far beyond the holdings in *Barclay* and *Stephens*. The crux of Richmond's argument is that, once a majority of a state supreme court rejects the factual and legal existence of a statutory aggravating circumstance, the minority justices should be precluded from considering the facts they have found to exist in their independent weighing decision. Such a contention is clearly not dictated by *Stephens* or *Barclay*, and is likewise not dictated by *Clemons*, *Stringer*, *Parker*, or *Sochor*.

In *Clemons*, this Court specifically recognized and reaffirmed its previous holding that neither the Sixth nor Eighth Amendments mandated that a defendant was entitled to a jury trial on whether a capital sentence was appropriate. 110 S. Ct. at 1446-47. In *Walton*, this Court reiterated its *Clemons* holding and found that aggravating circumstances are not "elements" of a capital offense. 110 S. Ct at 3054-55. "Aggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life." *Walton*, 110 S. Ct. at 3054 (citing *Poland v. Arizona*, 476 U.S. 147, 156 (1986)); *accord*, *Cabana v. Bullock*, 474 U.S. 376, 385 n.3 (1986) (Eighth Amendment requirement that capital punishment is reserved to those who actually killed, attempted to kill, or intended to kill, did not create "element" of "capital murder that must be found by the jury"). To impose a unanimity requirement on a sentencing body before its individual members may consider aggravation is contrary to this Court's holdings in *Clemons*, *Walton*, and *Bullock*, because it would tend to view aggravation as an "element" of the crime rather than a "guide" in making the choice between death and life.

In *Parker v. Dugger*, this Court applied its *Clemons* rule for the first time to a case where the state supreme

court vacated an aggravating circumstance on the basis of lack of evidence. 111 S. Ct. at 734. This Court found that the Florida Supreme Court did not reweigh mitigation and aggravation as a matter of state law. 111 S. Ct. at 738. This Court reversed because the Florida Supreme Court had misconstrued the trial court's finding regarding mitigation in conducting its harmless error analysis. 111 S. Ct. at 740. Such error deprived Parker of his constitutional right to individualized sentencing. *Id.*

In *Sochor v. Florida*, 60 U.S.L.W. at 4488-89, this Court reaffirmed its *Parker* holding, and held that, when a state supreme court invalidates an aggravating circumstance for lack of evidence, that court is required by *Clemons* either to reweigh or conduct a harmless error analysis. *Id.* Because the Florida Supreme Court does not reweigh, and the Florida Supreme Court did not make it clear that it did a harmless error analysis, this Court remanded to comply. *Id.*

Neither case answers the question before the Court at bar. In this case, two Arizona Supreme Court justices reviewed the evidence and found it did support the trial court's determination that Arizona's (F)(6) circumstance existed, and three other justices disagreed. The question then arises, did authority exist at the time Richmond's conviction became final that *"dictated"* that those two justices were required not to consider their findings in determining the propriety of the sentence? *Penry*, 109 S. Ct. at 2944 (emphasis in original). *Parker* and *Sochor* make clear that an aggravating circumstance that is unsupportable by the record cannot be considered in the balancing equation. What *Parker* and *Sochor* do not resolve is how an appellate court must resolve the issue when the appellate court justices disagree whether the circumstance exists. Because the issue is not resolved today, under

Teague this Court should not grant relief as long as the state courts engaged in a good-faith effort to apply the law as it then existed. A review of this Court's jurisprudence evidences that the Arizona Supreme Court cannot be faulted for not anticipating that this Court someday may require unanimity concerning aggravating circumstances.

Other jurisdictions, relying on this Court's jurisprudence, have specifically rejected the concept that a sentencing body must be unanimous before individual members may consider aggravation. In California, a defendant becomes death eligible if the jurors unanimously find a "special circumstance" allegation to be true. *People v. Bacigalupo*, 820 P.2d 559, 584 (Cal. 1991), *cert. pending*. Once a "special circumstance" is proved, however, the jurors are to balance specified aggravating circumstances against the mitigation to determine if the death penalty is appropriate. *Boyde v. California*, 494 U.S. 370, ___, 110 S. Ct. 1190, 1194 (1990). Under California's sentencing scheme, while the jurors must unanimously agree on the special circumstance, unanimity is not required on the existence of the aggravating circumstance used in the balancing equation. *Bacigalupo*, 820 P.2d at 583. The California Supreme Court, relying on this Court's finding that aggravating circumstances are not elements of a crime, has steadfastly refused to find that the Constitution mandates unanimity on the existence of aggravating circumstances before a circumstance may be considered. *Bacigalupo*, 820 P.2d at 583-84; *People v. Andrews*, 776 P.2d 285 (Cal. 1989). In California, this is true even if the jurors could not find one aggravating circumstance by a majority vote. *People v. Jackson*, 618 P.2d 149, 206 (Cal. 1980) (Mosk, J., dissenting), *cert. denied*, 450 U.S. 1035 (1981); *accord, Jones v. State*, 569 So. 2d 1234,

1238 (Fla. 1990) (juror unanimity not required in consideration of aggravation); *James v. State*, 453 So. 2d 786, 791-92 (Fla.), *cert. denied*, 469 U.S. 1098 (1984) (unanimity not required on advisory vote concerning penalty recommendation or *Enmund* finding).

In Virginia, where the jurors must be unanimous regarding their belief concerning the ultimate penalty, the Virginia Supreme Court has refused to find that the Constitution requires juror unanimity concerning which of the varying predicates they rely on in finding an aggravating factor. *Clark v. Commonwealth*, 257 S.E.2d 784, 791-92 (Va. 1979), *cert. denied*, 444 U.S. 1049 (1980). The federal courts in reviewing the Virginia practice have also refused to find a constitutional violation. *Briley v. Bass*, 584 F. Supp. 807, 819 (E.D. Va.), *aff'd*, 742 F.2d 155 (4th Cir.), *cert. denied*, 469 U.S. 893 (1984); *see also Bunch v. Thompson*, 949 F.2d 1354, 1367 (4th Cir. 1991), *cert. pending*.[10]

The State of Arizona has been unable to find any cases from this Court or other jurisdictions that would lend support for Richmond's argument that the Constitution requires unanimity before appellate jurists may apply an aggravating circumstance in their independent

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[10] In Ohio, while a three-judge trial panel must vote unanimously to impose a death sentence, the statutes place no similar unanimity requirement on the appellate courts that must independently reweigh the aggravation and mitigation on appeal. Ohio R.C. 2929.03(D)(3); *State v. Sowell*, 530 N.E.2d 1294, 1301 (Ohio 1988), *cert. denied*, 490 U.S. 1028 (1989). The Ohio Supreme Court has rejected the contention that on independent review the Eighth Amendment mandates unanimity by appellate courts to ensure constitutionally required reliability. *Id.*

review. By analogy, this Court's holdings in *Mills v. Maryland*, 486 U.S. 367, 108 S. Ct. 1860 (1988), and *McKoy v. North Carolina*, 494 U.S. 433, 110 S. Ct. 1227 (1990), indicate otherwise. In *Mills* and *McKoy*, this Court found as unconstitutional jury instructions that prohibited an individual juror from considering mitigation unless the entire jury unanimously found that the mitigation existed. *Mills*, 108 S. Ct. at 1870; *McKoy*, 110 S. Ct at 1231-32. This Court, focusing on the individual sentencing requirements of *Lockett* and *Eddings*, held that the Constitution precluded a state from constructing sentencing procedures that would prevent an individual juror from considering relevant evidence merely because other jurors did not agree. *Id.* This Court recognized that, to ensure an individualized sentence, *all* of the jurors must be free to consider the evidence they believe to exist. *Id.*

Given the fact that the most important factor in capital sentencing is *"individualized"* sentencing, nothing in this Court's previous opinions dictates that appellate court judges are prohibited from considering a statutory aggravating circumstance they find to exist on independent review, merely because a majority of the appellate court disagrees. *Ramos*, 463 U.S. at 1008; *Barclay*, 463 U.S. at 958; *Stephens*, 462 U.S. at 879 (emphasis in original). Richmond is not entitled to relief on this claim under *Teague*.

B. The Record Before the Court Is Sufficient To Support the Conclusion Reached by the Minority Justices That Richmond Committed This Crime in an Especially Depraved Manner, and This Claim Is Governed by *Lewis v. Jeffers*.

Assuming this Court agrees that minority justices may consider their finding of an aggravating circumstance, the question still remains what standard of review

applies to the minority position in a federal habeas corpus petition. Federal habeas corpus review of a state court's application of a constitutionally narrowed aggravating circumstance is limited to determining whether the state court's findings were so "arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation." *Jeffers*, 110 S. Ct. at 3102. In making this determination, the federal courts are to give deference to the state court's application of its own law and not to engage in *"de novo"* review. *Id.* Instead, the courts are to review the finding under the "rational fact-finder" standard of *Jackson v. Virginia*, 443 U.S. 307 (1979). *Jeffers*, 110 S. Ct. at 3102-03. That standard consists of asking "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found" the aggravating circumstance to exist. *Id.* (citing *Jackson*, 443 U.S. at 319, emphasis in original). A state court's finding that an aggravating circumstance exists in a particular case is "arbitrary and capricious," thereby giving rise to a constitutional violation, "if and only if no reasonable sentencer could have so concluded." 110 S. Ct. at 3103. The State believes this standard would also apply to a minority finding on an aggravating circumstance.

1. The facts, viewed in the light most favorable to the prosecution, demonstrate the reasonableness of the minority justices' position on the finding of "heinousness."

The evidence, viewed in the light most favorable to the prosecution, shows the following. While Rebecca Corella was prostituting herself with Bernard Crummett, Richmond told his 15-year-old girlfriend, Faith Erwin, that they were going to rob Crummett but not to say

anything. (J.A. at 23.) The three codefendants and Crummett left in a station wagon, with Richmond driving. (*Id.* at 23-24.) Richmond drove to a desert location near "A" mountain, where Richmond turned the car around, and then stopped. (*Id.* at 36.) After Richmond stopped the car, Crummett was told that they had a flat tire. (*Id.* at 23-24.) When Richmond and Crummett got out of the car, Richmond hit Crummett "with his fist and knocked him out." (*Id.* at 24.) While Crummett lay unconscious on the ground, Richmond walked around the car to the desert and retrieved some large rocks that were 6 to 8 inches across. (*Id.* at 24-25.) Richmond returned to where Crummett lay, and standing over him, hurled the rocks at the helpless man, striking him in the head. (*Id.* at 25.) When Erwin saw the blood after Richmond threw the rocks, she became sick and returned to the car. (R.T. Vol III at 478.)[11] Richmond got in the car and backed the car over Crummett and then threw it in gear and ran over him again. (J.A. at 26, 36; R.T. Vol. III at 480-81.) The autopsy evidence indicated that Richmond waited at least 30 seconds

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[11] Erwin's testimony on why she got back in the car is not precise. On direct examination, she stated that she got sick because she was "high" on heroin. (J.A. at 26.) On cross-examination she stated:

> A I thought he was going to knock him out, and leave. But then I got curious and when I saw the rocks, that is when I saw him throwing them.
>
> . . . .
>
> Q Alright. And then it was after that point that you got back in the car?
>
> A I went back around. I saw all the blood, and I didn't feel good.

(R.T. Vol. III at 478.)

from the first pass of the car until he ran over Crummett the second time. (J.A. at 20.)[12]

A defendant's actions will constitute the aggravating circumstance of especially heinous or depraved if they fall into one of the following categories: (1) relishing in the murder; (2) infliction of gratuitous violence upon the victim above that necessary to complete the object of the crime; (3) needless mutilation of the victim; (4) senseless crime; or (5) helpless victim. *State v. Gretzler*, 659 P.2d at 11. Richmond concedes in his brief before this Court that this is the test in Arizona. (Opening Brief at 28 n.13.)

In applying this test, the minority justices found as follows:

> In *Gretzler, supra*, we discussed factors which lead to a finding of heinousness or depravity. One factor is the infliction of gratuitous violence on the victim; another related factor is the needless mutilation of the victim. Here the victim was already unconscious and bleeding when he was run over not once, but twice, each time from a different direction. The evidence indicates that the first run by the vehicle was over the victim's head crushing his skull and killing him. The second run of the vehicle was over the body of the victim. The investigating officers found, at the location of the murder, two large pools of blood separated by about 30 feet, which was consistent with the body having been run over and dragged to where it was found. Again

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[12] There was contradictory evidence presented on some of the points stated above. Under the *Jeffers* standard, however, a federal court in a habeas corpus action does *not* attempt to review the record *"de novo"* to determine what it believes the facts show and how they should apply to the State's aggravating circumstance. *Jeffers*, 110 S. Ct. at 3102. Rather, the federal court reviews the evidence *"in the light most favorable to the prosecution."* *Id.* at 3102-03 (emphasis added).

> the fact that the victim in the instant case was run over twice and his skull was crushed, we find to be a ghastly mutilation of the victim.

(J.A. at 86-87.) Richmond's infliction of gratuitous violence upon the victim above that necessary to complete the object of the crime (i.e., robbery) was sufficient to show an especially heinous and depraved mind. *Gretzler*, 659 P.2d at 11; *accord*, *State v. Zaragoza*, 659 P.2d 22, 28 (Ariz.), *cert. denied*, 462 U.S. 1124 (1983) (murder of 78-year-old mentally impaired woman after rape and robbery was gratuitous violence because defendant could have accomplished criminal goal without killing her); *see also State v. Marlow*, 786 P.2d 395, 401 (Ariz. 1989) (killing done after defendant had completed robbery evidenced gratuitous violence); *State v. Correll*, 715 P.2d 721 (Ariz. 1986) (encouraging codefendant to kill after completing robbery evidence of depraved mind); *State v. Gillies*, 691 P.2d 655 (Ariz. 1984), *cert. denied*, 470 U.S. 1059 (1985) (killing to eliminate rape victim as a witness evidences depravity). Also, deliberately running over a person a second time, after waiting a minimum of 30 seconds, was sufficient evidence to believe it was done with the intent to mutilate the corpse.

The Ninth Circuit panel, upon reviewing the evidence and applicable Arizona standard, found that "a rational factfinder could indeed have found Crummett's murder heinous or depraved so as to warrant the penalty of death." (J.A. at 128.) The four dissenting judges on the motion for rehearing en banc focused not on the evidence in the "light most favorable to the prosecution," but instead recited the factual dispute regarding who was the driver of the car. (J.A. at 141.) The dissenting judges recognized that, implicit in the state court's minority

justices' finding[13] that the heinous circumstance existed, was the fact that Richmond drove the car. (J.A. at 139, 141, 143.) They challenged, however, the Arizona Supreme Court's ability to resolve the dispute over who drove the car, and claimed that, without the trial court's explicit resolution of the issue, the appellate court could not find the heinous circumstance to exist. The dissenting judges' reasoning and conclusions are erroneous, and so is Richmond's reliance on them in this Court.

2. The Arizona Supreme Court did not err in concluding that the trial court had found that Richmond drove the car that killed Crummett.

The trial court found that the crime was both cruel and depraved. A.R.S. § 13-703(F)(6) states that an aggravating circumstance exists if "[t]he defendant committed the offense in an especially heinous, cruel or depraved manner." Under Arizona law at the time, the Arizona Supreme Court had defined how the State was to prove heinousness.

> In determining whether a murder has been committed in an especially heinous or depraved manner, we must necessarily consider the *killer's state of mind at the time of the offense*. This state of mind may be shown by his behavior at or near the time of the offense.

[13] The dissenting en banc judges did not appear to recognize that the finding that the aggravating circumstance existed was by only a minority of two Arizona Supreme Court justices. The dissenters repeatedly and incorrectly stated over and over again that the "Arizona Supreme Court" found the heinous circumstance to exist. (J.A. at 139, 141-42, 144 n.4, 145, 149.)

State v. Lujan, 604 P.2d 629, 636 (Ariz. 1979) (emphasis added).[14] At Richmond's resentencing, defense counsel cited this part of the *Lujan* opinion to the trial court, and argued that the State had failed to prove the circumstance. (J.A. at 71.) The trial court rejected Richmond's argument finding "that the Defendant did commit the offense in this case in an especially heinous and cruel manner." (J.A. at 74.) On appeal, on review of Richmond's *Enmund* claim the supreme court stated:

> The evidence presented by the state was that the appellant drove the vehicle over the victim, thus killing him. The testimony of Faith Erwin was that the appellant was the driver at the time the victim was run over. The circumstantial evidence supports Faith's testimony. The circumstances show that appellant was the driver when the group left for the desert. The

[14] Richmond challenges the trial court's application of (F)(6) to his case because it was applied before the Arizona Supreme Court's limiting construction in *Gretzler*. (Opening Brief at 27-30.) Because a majority of the Arizona Supreme Court found that the circumstance did not exist, the trial court's application of the circumstance was vacated and its determination on the matter rendered irrelevant. *Richmond v. Ricketts*, 640 F. Supp. at 795-96. The sole issue now is whether the Arizona Supreme Court, after vacating that finding, complied with *Barclay*, *Ramos*, and *Stephens* in affirming the sentence. Because Richmond misconstrues what the Arizona Supreme Court did in *Gretzler*, the State will respond briefly to the claim. First, *Gretzler* did not announce a new rule of construction for (F)(6). *Gretzler* catalogued the Arizona Supreme Court's cases dealing with (F)(6), and stated that future cases should fit within its categories. Before the supreme court issued *Gretzler*, a trial court judge, who is presumed to know and apply the law, was able to review the Arizona Supreme Court cases dealing with (F)(6) and apply the circumstance. *See Walton*. If *Gretzler*'s limitation is constitutional, the cases decided before *Gretzler* must also be constitutional because *Gretzler*'s categories were based on those decisions.

> other woman, Becky Corella, was so short in stature that it was difficult for her to operate an automobile. Appellant was the leader of the group and directed the operation. With such support we believe the trial judge was justified in concluding that appellant drove the vehicle that was used to kill the victim.

(J.A. at 84.) This position was joined by the concurring justices. (J.A. at 92.) It appears that the trial court did conclude that Richmond was the driver.

Richmond contends, however, that the Arizona Supreme Court failed to determine who was driving the car. (Opening Brief at 32-33.) Such a contention is without merit given the above-cited part of Justice Holohan's opinion that was joined by a majority of the court. Also, as recognized by the dissenters in the Ninth Circuit, Justice Holohan's opinion regarding the existence of the heinous aggravating factor is contingent on the fact that Richmond drove the car. Justice Cameron's concurring opinion does not disagree on this point because he found only that heinousness was not shown based on his belief that there was insufficient evidence that Richmond knew or should have known that the victim was dead after the first pass of the car. (J.A. at 94.) Justice Feldman likewise did not take issue with the majority justices that the trial court implicitly found that Richmond was the driver. The Arizona Supreme Court's determination that the trial court found that Richmond was the driver is accorded a presumption of correctness under 28 U.S.C. § 2254. *Parker*, 111 S. Ct. at 739.

In *Clemons*, this Court rejected the claim that written findings were necessary to conduct appellate review. 110 S. Ct. at 1449. This Court has likewise recognized that appellate review of implied factual findings is not a violation of due process. *Wainwright v. Witt*, 469 U.S. 412, 431 (1985) (trial court not obligated to state reasoning for excluding juror when it is implicit from the record); *see*

also Sumner v. Mata, 455 U.S. 591, 597-98 (1982) (federal court must give state appellate court presumption of correctness for factual findings under 28 U.S.C. § 2254); *Sumner v. Mata*, 449 U.S. 539, 545-47 (1981) (same). In these cases, the federal courts were asked to review specific claims that, if true, were direct constitutional violations. Under the habeas corpus provisions of § 2254(d), this Court held that the federal courts must presume the factual predicates found by the state court to be correct. However, in *Jeffers* this Court found that the federal courts had to extend more than a mere presumption of correctness when the question presented was whether or not a state aggravating factor existed, because the resolution of that question necessarily was a matter of state law, "errors of which are not cognizable in federal habeas proceedings." 110 S. Ct. at 3103. If a state appellate court may rely on implicit factual findings regarding direct constitutional claims, it is unfathomable why it may not be permitted to do so when the claim goes only to a matter of state law. The Arizona Supreme Court did not err by determining that the trial court had made an implicit finding.

Next Richmond claims that, if the Arizona Supreme Court did make the implicit finding, it would violate *Bullock*, 474 U.S. at 388 n.5, because the court would be unable to do so on a paper record. (Opening Brief at 33.) Again, the resolution of this contention lies in the type of claim being presented in the habeas petition. In *Bullock*, this Court was faced with the question whether there was an *Enmund* Eighth Amendment violation. In discussing the procedures necessary to acquire a presumption of correctness under § 2254(d), this Court noted that under some circumstances an appellate determination in the first instance may not be "adequate." 474 U.S. at 388 n.5. When, however, the claim is simply a matter of state law,

the *Jeffers* standard applies. Under this standard, the habeas court reviews the entire record in the light most favorable to the prosecution, and affirms if the record is sufficient for any rational sentencer to find the result reached. *Jeffers*, 110 S. Ct. at 3102-03.

In the instant case, Justice Holohan's opinion states why the evidence supports the trial court's implicit finding. The only factual dispute Richmond raises is the claim that his confession to the police is more consistent with the physical evidence than Erwin's testimony because *he* told the police that Crummett was run over by the car twice, whereas Erwin said that Richmond was driving and their car hit Crummett only once. (Opening Brief at 33 n.16.) This would seem *to support*, not detract, from the Arizona Supreme Court's finding. Who better to know exactly how many times he ran over the victim than the driver of the car? Both women were aware of only one pass, Richmond admitted there were two. Erwin's testimony that Richmond was driving the car, read in conjunction with Richmond's confession that the car ran over Crummett twice, clearly supports the conclusion of the trial court and the Arizona Supreme Court.

Richmond takes issue with the conclusion reached by the minority justices, that he engaged in corpse mutilation, claiming such a holding "would require a finding that he purposely ran over the victim a second time after he was dead." (Opening Brief at 34.) The State disagrees that such a finding is required under Arizona law, but nonetheless believes the record supports such a finding. The evidence in the light most favorable to support the conclusion is that Richmond drove the car to the end of the dead end street and turned the car around. (J.A. at 36.) Richmond then assaulted Crummett, rendering him unconscious. (J.A. at 24-25.) Richmond got in his car and

backed over the victim's head. (J.A. at 36.) Because Richmond had already turned the car around, no other reason exists for the first pass of the car but to kill or maim. This was needless violence that the minority justices could have relied on to find gratuitous violence above the object of the crime. But Richmond did not stop there. He waited at least 30 seconds, and then he ran over the victim again. (J.A. at 20, 36.) Under this interpretation of the facts, the second pass was clearly an attempt either to maim or to render more injuries to the victim. Either way, Richmond's actions supported the minority position that Richmond engaged in corpse mutilation.[15] The Arizona Supreme Court majority's disagreement on the interpretation of the evidence does not detract from the evidence supporting the factual and legal conclusions reached by the minority justices. Richmond is not entitled to relief on this claim.

II. THE CONSTITUTION DOES NOT REQUIRE A REMAND TO THE STATE COURT TO DETERMINE WHETHER A STATE COURT JUSTICE INDEPENDENTLY REVIEWED THE RECORD WHEN THAT JUSTICE INDICATED IN HIS OPINION THAT HE CONCURRED WITH THE MAJORITY OPINION THAT INCLUDED THE REQUIREMENT THAT THE STATE SUPREME COURT INDEPENDENTLY REVIEW THE RECORD.

Richmond also claims that Justice Cameron's opinion violates *Clemons* because Justices Cameron and Gordon

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[15] Richmond contends that this reading of the record would present a due process problem because his attorney had elicited this damning evidence in the first instance. (Opening Brief at 33-34 n.17.) Richmond never claimed a due process violation in the state court, nor did he raise it in this habeas corpus petition. This due process claim is also not fairly subsumed in the question presented on certiorari to this Court.

did not indicate that they had independently reviewed the record and reweighed the mitigation against the remaining aggravating circumstances in reaching the conclusion that the death penalty was appropriate. (Opening Brief at 37.) Richmond argues that this asserted error is not harmless because Arizona is a "weighing" state, and that the Ninth Circuit panel opinion mischaracterizes Arizona law in not addressing this issue. (J.A. at 128-32.) For the reasons stated below, the State agrees in part and disagrees in part, but believes that the record in this case does not warrant a remand.

A. Arizona Is a Weighing State in That the Sentencing Body Must Weigh the Aggravating Circumstances Against All Relevant Factors in Determining if the Death Penalty Should Be Imposed.

The Ninth Circuit's panel opinion held that Arizona was not a weighing state as this Court defined that term. (J.A. at 131-32.) The court reasoned:

> [A] conclusion by the Arizona courts that there are no substantial mitigating circumstances is separate from and independent of any conclusion regarding the existence of aggravating circumstances.

(J.A. at 132.) While such a holding finds support from a reading of the words of the statute, the Arizona Supreme Court has interpreted the statute to require a weighing of the mitigating circumstances against the aggravating circumstances:

> The statute does not require that the number of aggravating circumstances be weighed against the number of mitigating circumstances. One mitigating circumstance, for example, may be "sufficiently substantial" to outweigh two aggravating circumstances. The converse is also true – one aggravating circumstance could be so substantial that two or more mitigating circumstances would not be "sufficiently substantial to call for leniency." . . . *Both the trial court and this court then must "weigh" the mitigating circumstances against the aggravating circumstances to determine if leniency is required.*

State v. Brookover, 601 P.2d 1322, 1326 (Ariz. 1979) (citations omitted).

In Richmond's first appeal before the Arizona Supreme Court, that court stated that its duty was to determine for itself if the aggravation outweighed the mitigation. (J.A. at 61.) In the second appeal, that court found that it had an independent duty to determine the weight of both the aggravation and mitigation and the propriety of the death sentence. (J.A. at 88.) The Ninth Circuit's opinion cannot be affirmed on the basis that Arizona does not weigh aggravation against mitigation. However, the result can and should be affirmed for the reasons stated below.

B. The Record Reveals That Justices Cameron and Gordon Independently Reviewed the Record, as State Law Requires, and Independently Determined That the Death Penalty Was Appropriate.

A federal habeas corpus court not only reviews the record of a case, but also considers state law in determining the ramifications of a state court opinion or decision. *Coleman v. Thompson*, ___ U.S. ___, 111 S. Ct. 2546, 2558-60 (1991). In Arizona, the state supreme court is an integral part of the sentencing determination, having imposed upon itself the requirement that every death penalty case be automatically appealed to it. Rule 31.2(b), Ariz. R. Crim. P. In that automatic appeal, the justices of the Arizona Supreme Court independently review the record

to determine for themselves "the presence or absence of aggravating and mitigating circumstances and the weight to give each," and also "independently determine the propriety of the sentence." (J.A. at 88.)

> [T]he propriety of the death penalty is not for the defendant or the trial court alone to decide. That decision rests also with this court upon automatic appeal and is guided, above all, by the state's narrowly construed statutes specifying the limited circumstances for which a defendant may be deemed death-eligible.

State v. Brewer, 826 P.2d at 791.

The Arizona Supreme Court has maintained from the first death penalty case after *Furman* that it would independently review the record and decide the propriety of the death penalty by determining the weight of the aggravation and mitigation and "determine for ourselves if the latter outweigh the former when we find both to be present." (J.A. at 61.) This is a position the Arizona Supreme Court has consistently maintained, as can be seen by the attached tables cataloging all of the capital cases reviewed by that court. In each case that the court was called on to review whether the aggravation outweighed mitigation thereby making the death penalty appropriate, the Arizona Supreme Court has stated that it has independently weighed mitigation against the aggravation.

In both of Richmond's appeals before the Arizona Supreme Court, that court set forth its standard in reviewing death sentences. (J.A. at 61, 88.) The concurring opinion of Justice Cameron, joined by Justice Gordon, begins by stating:

> I agree that the death penalty is *properly* imposed in this case. However, because I disagree with the majority in its holding that the

> crime was especially heinous and depraved, I feel that I must specially concur.

(J.A. at 92, emphasis added.) After discussing why he believed that the crime was not heinous and depraved, Justice Cameron concluded:

> The criminal record of this defendant, however, clearly places him above the norm of first degree murderers. He has been convicted of another first degree murder and a kidnapping, each arising in separate incidents. This history of serious violent crime justifies the imposition of the death penalty.
>
> I concur in the opinion of the majority *except its finding that this crime was heinous and depraved*, and I concur in the result.

(J.A. at 95-96, emphasis added.) Justice Cameron's statement that he agreed that the death penalty was "properly imposed" necessarily reflected his view that in this case the mitigation was not "sufficiently substantial to warrant leniency." A.R.S. § 13-703(C). Such a conclusion is mandated because a death penalty is not "properly imposed" in Arizona unless the sentencing body makes this determination.

Richmond claims that Justice Cameron could not have been concurring with Justice Holohan's opinion on the issue of independent review because that part of the opinion included in its weighing process the aggravating circumstance of heinous and depraved. Such a conclusion requires a Herculean jump in logic, and totally ignores Arizona law. Justice Cameron wrote that he concurred in Justice Holohan's opinion that stated the Arizona Supreme Court was required to independently review the record to determine if there was aggravation or mitigation and the weight to give each, and that the death penalty was required if mitigation was not "sufficiently substantial to call for leniency." (J.A. at 88.) Justice Cameron concurred that the death penalty was justifiable in

light of Richmond's prior record. (J.A. at 96.) If Justice Cameron disagreed with Justice Holohan's opinion on how Richmond's mitigation was to be viewed by the court, he would have stated that he disagreed. (*See* Justice Feldman's dissent.) Because he specifically concurred with Justice Holohan's opinion except for heinousness, no further elaboration was required.

To read Justice Cameron's opinion to mean he did not independently consider the mitigation would require this Court to hold that Justice Cameron did not follow the very law recited in the opinion with which he specifically concurred. Also, it would require this Court to disregard the seven opinions written by Justice Cameron prior to Richmond's appeal wherein he specifically stated that an independent review of the record was required by the Arizona Supreme Court, including weighing of aggravation and mitigation. (See tables 4-8.) One of those Cameron opinions is *State v. Watson*, 129 Ariz. 60, 628 P.2d 943 (1981), the very opinion Justice Feldman used to explain why he believed Richmond's changed-character evidence was entitled to more weight. Admittedly, the concurring jurists could have been clearer in their opinion if they had indicated specifically how the mitigation weighed in their decision. However, it is not the prerogative of a habeas corpus court to "tell state courts how they must write their opinions." *Coleman*, 111 S. Ct. at 2559. Given Arizona law, and the language of the very opinion at issue, Justices Cameron and Gordon clearly followed the law in Arizona and concluded that death was appropriate. A remand is not required.

Richmond makes a related argument that the majority analysis of the mitigation was flawed because it was not independent from the trial court's assessment, and that it misconstrued what the trial court found. (Opening Brief at 38.) The State has found no cases from this Court

that dictate that a reviewing court may not rely on the lower court's assessment of mitigation in reweighing the aggravation and mitigation. To the extent Richmond is arguing that this Court should now make such a ruling, it is barred by *Teague*. Furthermore, the majority did not misconstrue the trial court's finding. Under Arizona law, the burden of proving mitigation is on the defendant. *State v. Leslie*, 708 P.2d 719, 730 (Ariz. 1985). The failure to prove the existence of mitigation by a preponderance of the evidence precludes the trial court from finding the mitigating circumstance. *Id.* This procedure is constitutional. *Walton*, 110 S. Ct. at 3055-56 (plurality opinion).

After considering all of Richmond's evidence, the trial court concluded that it was "unable to make a definitive finding." (J.A. at 75.) A majority of the Arizona Supreme Court interpreted that finding as meaning that the trial court was not "convinced that [Richmond's] character could be viewed as a mitigating factor," and explained why the trial court was justified in arriving at that conclusion. (J.A. at 89.) Under Arizona law, Richmond's failure to convince the trial court that he had changed his character precludes consideration of that factor in mitigation. The district court, after analyzing the evidence, concurred with the Arizona Supreme Court. (*See* footnote 5 supra.) The Arizona Supreme Court did not err on this matter.[16]

CONCLUSION

This case presents the Court with a microcosm of what is truly wrong with our criminal justice system

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[16] Respondents concur with Richmond that if this Court finds reversible error under either of Richmond's arguments, the writ should issue and the case referred to the Arizona Supreme Court for further review. (Opening Brief at 42.)

regarding capital litigation – the unending delay in carrying out the law. Richmond presents no claim that he is factually innocent of any crime. In fact, he stipulates to the core facts – he participated in a robbery to the point of striking an unconscious victim with rocks, and the victim died in furtherance of that robbery. Richmond must admit that this is not his first involvement in serious criminal activity. He has prior convictions for first-degree murder and armed kidnapping, putting him in the elite of death row inmates.[17] Richmond's contentions lie in claiming that the Arizona Supreme Court erred by not anticipating many of this Court's recent decisions in writing their opinion in 1983. No justification exists for further review. The trial court has twice reviewed the evidence and determined that death was appropriate. The Arizona Supreme Court has twice affirmed the propriety of the death sentence on independent review. Further review mandated by this Court would undeniably violate the principles of comity and finality articulated by this Court in *Teague*. Accordingly, the Ninth Circuit Court of Appeals' decision should be affirmed.

Respectfully submitted,

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[17] In this country, while 7 out of 10 death row inmates may have prior convictions, only 1 in 11 death row inmates have prior homicide convictions. Bureau of Justice Statistics Bulletin, Capital Punishment 1990, U.S. Department of Justice, at 1.

APPENDICES

TABLE 1

Arizona Death Penalty Cases
Conviction Reversed or Sentence Vacated as a Matter of Law and Remanded for a New Trial or a Resentencing

State v. Ceja 113 Ariz. 39 546 P.2d 6 (1976) (Struckmeyer)	Reversed the conviction and remanded for a new trial.
State v. Watson 114 Ariz. 1 559 P.2d 121 (1976) (Cameron) *cert. denied* 430 U.S. 986 (1977)	The court held that the trial court improperly excised material from the presentence report and remanded for resentencing.
State v. Treadaway 116 Ariz. 163 568 P.2d 1061 (1977) (Gordon)	Reversed conviction because of admission of evidence, and remanded for a new trial.
State v. Evans 120 Ariz. 158 584 P.2d 1149 (1978) (Holohan)	Remanded for resentencing pursuant to *State v. Watson*.
State v. Steelman 120 Ariz. 301 585 P.2d 1213 (1978) (Cameron)	Remanded for resentencing pursuant to *State v. Watson*.
State v. Watson 120 Ariz. 441 586 P.2d 1253 (1978) (Cameron) *cert. denied* 440 U.S. 924 (1979)	Remanded for resentencing because of unconstitutional limitation on mitigating circumstances.

Table 1-2

State v. Morales 120 Ariz. 517 587 P.2d 236 (1978) (Cameron)	Reversed the conviction because of limitation on cross-examination, remanded for a new trial.
State v. Melandez 121 Ariz. 1 588 P.2d 294 (1978) (Cameron)	Reversed the conviction because of limitation on cross-examination, remanded for a new trial.
State v. Valencia 121 Ariz. 191 589 P.2d 434 (1979) (Cameron)	Remanded for resentencing pursuant to *State v. Watson*.
State v. Edwards 122 Ariz. 206 594 P.2d 72 (1979) (Hays) *rev'd* 451 U.S. 477 (1981)	Remanded for resentencing pursuant to *State v. Watson*.
State v. Smith (J.C.) 123 Ariz. 231 599 P.2d 187 (1979) (Gordon)	Remanded for resentencing pursuant to *State v. Watson*.
State v. Valencia 124 Ariz. 139 602 P.2d 807 (1979) (Hays)	Remanded for resentencing because the trial court received ex parte information relating to the sentencing.
State v. Dunlap 125 Ariz. 104 608 P.2d 41 (1980) (Gordon)	Reversed the conviction because of limitation on cross-examination, remanded for a new trial.
State v. Robison 125 Ariz. 107 608 P.2d 44 (1980) (Holohan)	Reversed the conviction because of limitation on cross-examination, remanded for a new trial.

Table 1-3

State v. Gretzler 126 Ariz. 60 612 P.2d 1023 (1980) (Cameron)	Remanded for resentencing pursuant to *State v. Watson*.
State v. McDaniel 127 Ariz. 13 617 P.2d 1129 (1980) (Cameron)	Reversed the conviction because of limitation on cross-examination, remanded for a new trial.
State v. McVay 127 Ariz. 450 622 P.2d 9 (1980) (Cameron)	Reversed conviction because of improper admission of hearsay, remanded for a new trial.
State v. Emery 131 Ariz. 493 642 P.2d 838 (1982) (Hays)	Reversed conviction because of admission of confession that it held was involuntary, remanded for a new trial.
State v. Poland 132 Ariz. 269 645 P.2d 784 (1982) (Cameron)	Reversed conviction because of juror misconduct, remanded for a new trial.
State v. Carriger 132 Ariz. 301 645 P.2d 816 (1982) (Cameron)	Vacated sentence because of ineffective assistance of counsel, remanded for resentencing.
State v. McLoughlin 133 Ariz. 458 652 P.2d 531 (1982) (Gordon)	Reversed conviction because of juror misconduct, remanded for a new trial.
State v. McMurtrey 136 Ariz. 93, 101 664 P.2d 637, 645 (1983) (Gordon) *cert. denied* 464 U.S. 858 (1983)	Vacated sentence because the trial court appeared to erroneously conclude that certain evidence could not support a mitigating circumstance.

Table 1-4

State v. Rumsey 136 Ariz. 166 665 P.2d 48 (1983) (Feldman) *aff'd*, 467 U.S. 203 (1984)	Vacated sentence because resentencing was double jeopardy, sentence reduced to life.
State v. Smith (Roger) 136 Ariz. 273 665 P.2d 995 (1983) (Hays)	Vacated sentence because of ineffective assistance of counsel, remanded for resentencing.
State v. Leslie 136 Ariz. 463 666 P.2d 1072 (1983) (Hays)	Affirmed order granting resentencing because the trial court received ex parte information relating to the sentencing.
State v. Hensley 137 Ariz. 80 669 P.2d 58 (1983) (Feldman)	Vacated sentence because, when the defendant's attorney agreed to submit the case to the trial court on the basis of a stipulated record, the defendant's attorney did not realize or intend that the trial court would rely on those exhibits in determining the sentence; remanded for resentencing.
State v. Routhier 137 Ariz. 90 669 P.2d 68 (1983) (Holohan) *cert. denied* 464 U.S. 1073 (1984)	Reversed conviction because improper questioning about the defendant's conduct after he exercised his right to remain silent, remanded for a new trial.
State v. Spoon 137 Ariz. 105 669 P.2d 83 (1983) (Gordon)	Reversed conviction because of admission of the defendant's confession taken in violation of *Edwards*, remanded for a new trial.

Table 1-5

State v. Jordan 137 Ariz. 504 672 P.2d 169 (1983) (Hays)	Remanded because the trial court failed to hold a hearing on the defendant's claim that the trial court improperly became involved in the plea negotiations.
State v. Cruz 137 Ariz. 541 672 P.2d 470 (1983) (Gordon)	Reversed conviction because the trial court failed to sever trials of codefendants, remanded for a new trial.
State v. Vickers 138 Ariz. 450 675 P.2d 710 (1983) (per curiam)	Reversed conviction because of an improper jury instruction, remanded for a new trial.
State v. Walker 138 Ariz. 491 675 P.2d 1310 (1984) (Holohan)	Reversed conviction because of improper jury instructions, remanded for a new trial.
State v. Emery 141 Ariz. 549 688 P.2d 175 (1984) (Gordon)	Reduced sentence to life because there was no evidence that the defendant killed, attempted to kill, or intended to kill.
State v. Schad 142 Ariz. 619 691 P.2d 710 (1984) (Hays)	Reversed conviction because of an improper jury instruction, remanded for a new trial.
State v. McMurtrey 143 Ariz. 71 691 P.2d 1099 (1984) (Cameron)	Vacated sentence because the trial court required the defendant to prove mitigation beyond a reasonable doubt, remanded for resentencing.
State v. Rossi 146 Ariz. 359 706 P.2d 371 (1985) (Gordon)	Remanded for resentencing because the trial court used the wrong standards for determining and applying mitigating circumstances.

Table 1-6

State v. Tittle 147 Ariz. 339 710 P.2d 449 (1985) (Gordon)	Reversed conviction because of an improper jury instruction, remanded for a new trial.
State v. Correll 148 Ariz. 468 715 P.2d 721 (1986) (Cameron)	Reduced one of three sentences to life because the evidence did not show that the defendant killed, attempted to kill, or intended to kill that victim.
State v. Mauro 149 Ariz. 24 716 P.2d 393 (1986) (Hays) *rev'd* 481 U.S. 520 (1987)	Reversed conviction because of admission of the defendant's confession taken in violation of *Edwards*, remanded for a new trial.
State v. Fisher 152 Ariz. 116 730 P.2d 825 (1986) (Cameron)	Remanded for a new hearing on the defendant's claim of newly-discovered evidence.
State v. Rossi 154 Ariz. 245 741 P.2d 1223 (1987) (Gordon)	Remanded for resentencing because the trial court erroneously concluded that the defendant had not proved two mitigating circumstances.
State v. Charo 156 Ariz. 561 754 P.2d 288 (1988) (Holohan)	Reversed conviction because erroneous admission of hearsay evidence, remanded for a new trial.
State v. Lopez (George V.) 158 Ariz. 258 762 P.2d 545 (1988) (Moeller)	Reversed the robbery conviction, and then reversed the murder conviction because the jurors were instructed on both premeditated murder and felony murder, remanded for a new trial.

Table 1-7

State v. Tison 160 Ariz. 501 774 P.2d 805 (1989) (per curiam)	Remanded for resentencing because the trial court failed to hold an evidentiary hearing.
State v. Fulminante 161 Ariz. 237 778 P.2d 602 (1989) (Cameron) *aff'd* 111 S. Ct. 1246 (1991)	Reversed conviction because of the admission of a confession that it concluded was involuntary, and remanded for a new trial.
State v. Romanosky 162 Ariz. 217 782 P.2d 693 (1989) (Moeller)	Reversed conviction because of admission of irrelevant evidence that showed the commission of other crimes, and remanded for a new trial.
State v. Connor 163 Ariz. 97 786 P.2d 949 (1990) (Moeller)	Reduced the sentence to life because the trial court erroneously allowed the state to withdraw from the plea agreement.
State v. Mathers 165 Ariz. 64 796 P.2d 866 (1990) (Moeller)	Reversed conviction because it concluded that the evidence was not sufficient to support the conviction.

Table 2-1

TABLE 2

ARIZONA DEATH PENALTY CASES
AGGRAVATING CIRCUMSTANCES AND NO
MITIGATING CIRCUMSTANCES SENTENCE AFFIRMED
WITHOUT A NEED FOR WEIGHING

State v. Jordan 114 Ariz. 452, 456 561 P.2d 1224, 1228 (1976) (Hays) *vacated* 438 U.S. 911 (1978)	Pursuant to its independent review of the facts, the court affirmed the finding of four aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency, therefore did not have to weigh; affirmed the sentence.
State v. Knapp 114 Ariz. 531, 542 562 P.2d 704, 715 (1977) (Hays) *cert. denied* 435 U.S. 908 (1978)	Pursuant to its independent review of the facts, the court affirmed the finding of one aggravating circumstance and no mitigating circumstances, therefore did not have to weigh; affirmed the sentence.
State v. Holsinger 115 Ariz. 89, 98 563 P.2d 888, 897 (1977) (Cameron)	Pursuant to its independent review of the facts, the court affirmed the finding of three aggravating circumstances and no mitigating circumstances, therefore did not have to weigh; affirmed the sentence.
State v. Ceja 115 Ariz. 413, 416 565 P.2d 1274, 1277 (1977) (Hays) *cert. denied* 434 U.S. 975 (1977)	Pursuant to its independent review of the facts, the court reversed the finding of one of the aggravating circumstances, affirmed the finding of the other aggravating circumstance, and affirmed the finding of no mitigating circumstances, and therefore did not have to weigh; affirmed the sentence.

Table 2-2

State v. Bishop 118 Ariz. 263, 269 576 P.2d 122, 128 (1978) (Holohan) *vacated* 439 U.S. 810 (1978)	Pursuant to its independent review of the facts, the court affirmed the finding of one aggravating circumstance and no mitigating circumstances, therefore did not have to weigh; affirmed the sentence.
State v. Arnett 119 Ariz. 38, 51 579 P.2d 542, 555 (1978) (Hays)	Pursuant to its independent review of the facts, the court affirmed the finding of two aggravating circumstances and no mitigating circumstances, therefore did not have to weigh; affirmed the sentence.
State v. Carriger 123 Ariz. 335 599 P.2d 788 (1979) (Hays) *cert. denied* 444 U.S. 1049 (1980)	Defendant challenged the constitutionality of the statute, but did not challenge the findings of aggravating and mitigating circumstances; the court affirmed the conviction and sentence.
State v. Evans 124 Ariz. 526, 528 606 P.2d 16, 18 (1980) (Hays) *cert. denied* 449 U.S. 891 (1980)	In an earlier opinion, the court affirmed the finding of one aggravating circumstance; in this opinion, pursuant to its independent review of the facts, it affirmed the finding of no mitigating circumstances and therefore did not have to weigh; affirmed the sentence.
State v. Mata (Luis) 125 Ariz. 233, 242 609 P.2d 48, 57 (1980) (Gordon) *cert. denied* 449 U.S. 938 (1980)	Pursuant to its independent review of the facts, the court affirmed the finding of two aggravating circumstances and no mitigating circumstances, and therefore did not have to weigh; affirmed the sentence.

State v. Smith (Sylvester) 125 Ariz. 412, 417 610 P.2d 46, 51 (1980) (Struckmeyer)	Pursuant to its independent review of the facts, the court affirmed the finding of one aggravating circumstance and no mitigating circumstances, and therefore did not have to weigh; affirmed the sentence.
State v. Jordan 126 Ariz. 283 614 P.2d 825 (1980) (Gordon) *cert. denied* 449 U.S. 986 (1980)	Pursuant to its independent review of the facts, the court affirmed the finding of two aggravating circumstances and no mitigating circumstances, and therefore did not have to weigh; affirmed the sentence.
State v. Bishop 144 Ariz. 521 698 P.2d 1240 (1985) (Holohan)	Rejected the defendant's claim that he was entitled to a unanimous jury on the question of premeditated murder or felony murder, and affirmed the conviction and sentence.
State v. Evans 147 Ariz. 57 708 P.2d 738 (1985) (Holohan)	Rejected the defendant's claim that his prior conviction was not a crime of violence, and affirmed the sentence.
State v. Serna 167 Ariz. 373 807 P.2d 1109 (1991) (Moeller) *cert. denied* 112 S. Ct. 214 (1991)	Affirmed the trial court's denial of a motion for a new trial based on newly-discovered evidence.

TABLE 3

Arizona Death Penalty Cases Sentence Reduced to Life or Remanded for Resentencing Because Court Struck All Aggravating Circumstances

State v. Verdugo 112 Ariz. 288, 292 541 P.2d 388, 392 (1975) (Struckmeyer)	Pursuant to its independent review of the facts, the court struck the only aggravating circumstance and reduced the sentence to life.
State v. Murphy 113 Ariz. 416 555 P.2d 1110 (1976) (Holohan)	The court set aside the one aggravating circumstance as a matter of law and reduced the sentence to life.
State v. Lee 114 Ariz. 101, 105 559 P.2d 657, 661 (1976) (Holohan)	Pursuant to its independent review of the facts, the court held that there was insufficient proof for the two aggravating circumstances and set them aside, and remanded for resentencing.
State v. Lujan 124 Ariz. 365, 372 604 P.2d 629, 636 (1979) (Gordon)	Pursuant to its independent review of the facts, the court set aside the only aggravating circumstance and reduced the sentence to life.
State v. Madsen 125 Ariz. 346, 352 609 P.2d 1046, 1052 (1980) (Cameron) *cert. denied* 449 U.S. 873 (1980)	Pursuant to its independent review of the facts, the court set aside the only two aggravating circumstances and reduced the sentence to life.

State v. Prince 160 Ariz. 268, 275 772 P.2d 1121, 1128 (1989) (Moeller)	Reduced the sentence to life because the state failed to prove the one aggravating circumstance, and remanded for the trial court to determine whether the sentence would be consecutive to the other sentences.

TABLE 4

Arizona Death Penalty Cases Stating Independent Weighing Conviction and Sentence Affirmed No Changes in the Aggravating or Mitigating Circumstances

State v. Richmond 114 Ariz. 186, 196 560 P.2d 41, 51 (1976) (Holohan) *cert. denied* 433 U.S. 915 (1977)	The court affirmed the finding of two aggravating circumstances and no mitigating circumstances, and pursuant to its independent review, affirmed the sentence.
State v. Blazak 114 Ariz. 199, 206 560 P.2d 54, 61 (1977) (Struckmeyer)	The court affirmed the finding of four aggravating circumstances and no mitigating circumstances, and pursuant to its independent review, affirmed the sentence.
State v. Arnett 125 Ariz. 201, 204 608 P.2d 778, 781 (1980) (Cameron)	In an earlier opinion, the court had affirmed the finding of one aggravating circumstance; in this opinion, it reviewed the trial court's finding of no mitigating circumstances sufficiently substantial to call for leniency, and pursuant to its independent review, affirmed the sentence.
State v. Knapp 125 Ariz. 503 611 P.2d 90 (1979) (Hays)	The trial court found one aggravating and one mitigating circumstance; the court held that life was not mandatory when there was one aggravating circumstance and one mitigating circumstance, but instead only when the mitigating circumstances are sufficiently substantial to call for leniency, and affirmed the sentence.

Table 4-2

State v. Ceja 126 Ariz. 35, 40 612 P.2d 491, 496 (1980) (Hays)	The trial court found one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency; the court affirmed the finding of the one aggravating circumstance, and upon its review of the mitigation presented, found no mitigating circumstances that would indicate that the imposition of the death penalty was inappropriate, and pursuant to its independent review, affirmed the sentence.
State v. Bishop 127 Ariz. 531, 535 622 P.2d 478, 482 (1980) (Holohan)	The trial court found one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the one aggravating circumstance, and pursuant to its independent weighing, found that the mitigation was not sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Britson 130 Ariz. 380, 389 636 P.2d 628, 637 (1981) (Gordon)	The trial court found one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the one aggravating circumstance, and pursuant to its independent weighing, found that the mitigation was not sufficiently substantial to call for leniency, and affirmed the sentence.

Table 4-3

State v. Smith (J.C.) 131 Ariz. 29, 31 638 P.2d 696, 698 (1981) (Struckmeyer)	Pursuant to its independent review of the facts, the court agreeed with the trial court that the defendant failed to establish any mitigating circumstances; the court concluded that, because there were several aggravating circumstances and no mitigating circumstances sufficient to overcome the aggravating circumstances, the sentence of death was proper.
State v. Gerlaugh 135 Ariz. 89, 89 659 P.2d 642, 642 (1983) (Hays)	The trial court found three aggravating circumstances and one mitigating circumstance; pursuant to its independent review of the facts, the court affirmed the finding of the three aggravating circumstances, and pursuant to its independent weighing, found that the mitigation was not sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Woratzeck 134 Ariz. 452, 456 657 P.2d 865, 869 (1982) (Hays)	The trial court found two aggravating circumstances and no mitigating circumstances; pursuant to its independent review of the facts, the court affirmed the finding of the two aggravating circumstances and no mitigating circumstances, and pursuant to its independent review, affirmed the sentence.

Table 4-4

State v. Zaragoza 135 Ariz. 63, 68 659 P.2d 22, 27 (1983) (Gordon) *cert. denied* 462 U.S. 1124 (1983)	The trial court found two aggravating circumstances and no mitigating circumstances; pursuant to its independent review of the facts, the court affirmed the finding of the two aggravating circumstances and rejected all of the defendant's proposed mitigating circumstances, and pursuant to its independent review, affirmed the sentence.
State v. Adamson 136 Ariz. 250, 266 665 P.2d 972, 988 (1983) (Gordon) *cert. denied* 464 U.S. 865 (1983)	The trial court found two aggravating circumstances and no mitigating circumstances; pursuant to its independent review of the facts, the court affirmed the finding of the two aggravating circumstances, and held that the mitigating circumstances were not sufficiently substantial to outweigh the aggravating circumstances, and affirmed the sentence.
State v. Richmond 136 Ariz. 312, 320 666 P.2d 57, 65 (1983) (Holohan) *cert. denied* 464 U.S. 986 (1983)	The trial court found three aggravating circumstances and five mitigating circumstances; pursuant to its independent review of the facts, the court affirmed the finding of the three aggravating circumstances, and held that the mitigating circumstances were not sufficiently substantial to outweigh the aggravating circumstances, and affirmed the sentence.

Table 4-5

State v. Harding 137 Ariz. 278, 293 670 P.2d 383, 398 (1983) (Cameron) *cert. denied* 465 U.S. 1013 (1984)	The trial court found four aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the four aggravating circumstances, and found no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstances, and affirmed the sentence.
State v. Lambright 138 Ariz. 63, 75 673 P.2d 1, 13 (1983) (Cameron) *cert. denied* 469 U.S. 892 (1984)	The trial court found one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the aggravating circumstance, and found no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstances, and affirmed the sentence.
State v. Smith (Robert) 138 Ariz. 79, 85 673 P.2d 17, 23 (1983) (Cameron) *cert. denied* 465 U.S. 1074 (1984)	The trial court found one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the aggravating circumstance, and found no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance, and affirmed the sentence.

Table 4-6

State v. Summerlin 138 Ariz. 426, 436 675 P.2d 686, 696 (1983) (Cameron)	The trial court found two aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the two aggravating circumstances, and found no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstances, and affirmed the sentence.
State v. Libberton 141 Ariz. 132, 139 685 P.2d 1284, 1291 (1984) (Hays)	The trial court found two aggravating circumstances and no mitigating circumstances; pursuant to its independent review of the facts, the court affirmed the finding of the two aggravating circumstances, and found no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstances, and affirmed the sentence.
State v. Fisher 141 Ariz. 227, 253 686 P.2d 750, 776 (1984) (Gordon) *cert. denied* 469 U.S. 1066 (1984)	The trial court found two aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the two aggravating circumstances, and found no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstances, and affirmed the sentence.

Table 4-7

State v. Chaney 141 Ariz. 295, 313 686 P.2d 1265, 1283 (1984) (Hays)	The trial court found one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the one aggravating circumstance, and found no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance, and affirmed the sentence.
State v. Harding 141 Ariz. 492, 500 687 P.2d 1247, 1255 (1984) (Hays)	The trial court found four aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the four aggravating circumstances, and found no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstances, and affirmed the sentence.
State v. Villafuerte 142 Ariz. 323, 332 690 P.2d 42, 51 (1984) (Cameron) *cert. denied* 469 U.S. 1230 (1985)	The trial court found one aggravating circumstance and no mitigating circumstances; pursuant to its independent review of the facts, the court affirmed the finding of the one aggravating circumstance, and found no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance, and affirmed the sentence.

Table 4-8

State v. Clabourne 142 Ariz. 335, 348 690 P.2d 54, 67 (1984) (Cameron)	The trial court found one aggravating circumstance and no mitigating circumstances; pursuant to its independent review of the facts, the court affirmed the finding of the one aggravating circumstance, and found no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance, and affirmed the sentence.
State v. Gillies 142 Ariz. 564, 571 691 P.2d 1059, 1066 (1984) (Hays) *cert. denied* 470 U.S. 1059 (1985)	The trial court found one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the one aggravating circumstance, and found no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance, and affirmed the sentence.
State v. Hensley 142 Ariz. 598, 603 691 P.2d 689, 694 (1984) (Gordon)	The trial court found one aggravating circumstance and one mitigating circumstance; pursuant to its independent review of the facts, the court affirmed the finding of the one aggravating circumstance, and found that the one mitigating circumstance was not sufficiently substantial to outweigh the one aggravating circumstance, and affirmed the sentence.

Table 4-9

State v. Carriger 143 Ariz. 142, 162 692 P.2d 991, 1011 (1984) (Hays) *cert. denied* 471 U.S. 1111 (1985)	The trial court found three aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the three aggravating circumstances, and found no mitigating circumstances sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Nash 143 Ariz. 392, 404 694 P.2d 222, 234 (1985) (Gordon) *cert. denied* 471 U.S. 1143 (1985)	The trial court found three aggravating circumstances and no mitigating circumstances; pursuant to its independent review of the facts, the court affirmed the finding of the three aggravating circumstances, and found no mitigating circumstances, and affirmed the sentence.
State v. Gerlaugh 144 Ariz. 449, 465 698 P.2d 694, 710 (1985) (Hays)	On petition for post-conviction relief, the trial court found that the proposed mitigation would not have changed the sentence; the court concluded that there was no reasonable probability that the proposed mitigation would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances.

Table 4-10

State v. Roscoe 145 Ariz. 212, 226 700 P.2d 1312, 1326 (1984) (Feldman) *cert. denied* 471 U.S. 1094 (1985)	The trial court found one aggravating circumstance and no mitigating circumstances; pursuant to its independent review of the facts, the court affirmed the finding of the one aggravating circumstance, and found no mitigating circumstances sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Martinez-Villareal 145 Ariz. 441, 451 702 P.2d 670, 680 (1985) (Holohan) *cert. denied* 474 U.S. 975 (1985)	The trial court found two aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the two aggravating circumstances, and found no mitigating circumstances sufficiently substantial to call for leniency, and affirmed the sentence.
State v. McMurtrey 151 Ariz. 105, 110 726 P.2d 202, 207 (1986) (Cameron) *cert. denied* 480 U.S. 911 (1987)	The trial court found one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the one aggravating circumstance, and found no mitigating circumstances sufficiently substantial to call for leniency, and affirmed the sentence.

Table 4-11

State v. Wallace 151 Ariz. 362, 366 728 P.2d 232, 236 (1986) (Hays) *cert. denied* 483 U.S. 1011 (1987)	The trial court found one aggravating circumstance and one mitigating circumstance; pursuant to its independent review of the facts, the court affirmed the finding of the one aggravating circumstance, and found that the one mitigating circumstance was not sufficiently substantial to call for leniency, and affirmed two of the three sentences.
State v. LaGrand (Karl) 152 Ariz. 483, 489 733 P.2d 1066, 1072 (1987) (Gordon) *cert. denied* 484 U.S. 872 (1987)	The trial court found three aggravating circumstances and three mitigating circumstances; pursuant to its independent review of the facts, the court affirmed the finding of the three aggravating circumstances, and found that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentence.
State v. LaGrand (Walter) 153 Ariz. 21, 34 734 P.2d 563, 576 (1987) (Gordon) *cert. denied* 484 U.S. 872 (1987)	The trial court found three aggravating circumstances and three mitigating circumstances; pursuant to its independent review of the facts, the court affirmed the finding of the three aggravating circumstances, and found that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentence.

Table 4-12

State v. Moorman 154 Ariz. 578, 587 744 P.2d 679, 688 (1987) (Feldman)	The trial court found three aggravating circumstances and one mitigating circumstance; pursuant to its independent review of the facts, the court affirmed the finding of the three aggravating circumstances, and found that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Beaty 158 Ariz. 232, 242 762 P.2d 519, 529 (1988) (Cameron) *cert. denied* 491 U.S. 910 (1989)	The trial court found one aggravating circumstance and no mitigating circumstances; pursuant to its independent review of the facts, the court affirmed the finding of the one aggravating circumstance, and found no mitigating circumstances sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Vickers 159 Ariz. 532, 544 768 P.2d 1177, 1189 (1989) (Cameron) *cert. denied* 110 S. Ct. 3298 (1990)	The trial court found five aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the five aggravating circumstances, and found no mitigating circumstances sufficiently substantial to call for leniency, and affirmed the sentence.

Table 4-13

State v. Walton 159 Ariz. 571, 586 769 P.2d 1017, 1032 (1989) (Holohan) *aff'd* 110 S. Ct. 3047 (1990)	The trial court found two aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the two aggravating circumstances, and found no mitigating circumstances sufficiently substantial to call for leniency, and affirmed the sentence.
State v. McCall 160 Ariz. 119, 131 770 P.2d 1165, 1177 (1989) (Moeller) *cert. denied* 110 S. Ct. 3289 (1990)	The trial court found two aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the two aggravating circumstances, and found no mitigating circumstances sufficiently substantial to call for leniency, and affirmed the sentences.
State v. Wallace 160 Ariz. 424, 428 773 P.2d 983, 987 (1989) (Fernandez) *cert. denied* 110 S. Ct. 1513 (1990)	The trial court found one aggravating circumstance and one mitigating circumstance, which it concluded was not sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the one aggravating circumstance, and agreed that the one mitigating circumstance was not sufficiently substantial to call for leniency, and affirmed the sentences.

Table 4-14

State v. Serna 163 Ariz. 260, 269 787 P.2d 1056, 1065 (1990) (Moeller)	The trial court found two aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the two aggravating circumstances, and found that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Washington 165 Ariz. 51, 61 796 P.2d 853, 863 (1990) (Roll) *cert. denied* 111 S. Ct. 1091 (1991)	The trial court found two aggravating circumstances and no mitigating circumstances; pursuant to its independent review of the facts, the court affirmed the finding of the two aggravating circumstances, and found no mitigating circumstances sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Comer 165 Ariz. 413, 428 799 P.2d 333, 348 (1990) (Contreras) *cert. denied* 111 S. Ct. 1404 (1991)	The trial court found three aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the three aggravating circumstances, and found no mitigating circumstances sufficiently substantial to call for leniency, and affirmed the sentence.

Table 4-15

State v. Williams 166 Ariz. 132, 141 800 P.2d 1240, 1249 (1987) (Feldman) *cert. denied* 111 S. Ct. 2043 (1991)	The trial court found two aggravating circumstances and no mitigating circumstances; pursuant to its independent review of the facts, the court affirmed the finding of the two aggravating circumstances, and found no mitigating circumstances sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Amaya-Ruiz 166 Ariz. 152, 177 800 P.2d 1260, 1285 (1990) (Corcoran) *cert. denied* 111 S. Ct. 2044 (1991)	The trial court found one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the one aggravating circumstance, and found no mitigating circumstances sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Stanley 167 Ariz. 519, 528 809 P.2d 944, 953 (1991) (Hathaway) *cert. denied* 112 S. Ct. 660 (1991)	The trial court found three aggravating circumstances and five mitigating circumstances, but concluded that they were not sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the three aggravating circumstances, and agreed that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentence.

Table 4-16

State v. Lavers 168 Ariz. 376, 391 814 P.2d 333, 348 (1991) (Gordon) *cert. denied* 112 S. Ct. 343 (1991)	The trial court found three aggravating circumstances for one killing and two aggravating circumstances for the other, and found four mitigating circumstances, but concluded that they were not sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of all of the aggravating circumstances, and agreed that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentences.
State v. White 168 Ariz. 500, 512 815 P.2d 869, 881 (1991) (Cameron) *cert. denied* 112 S. Ct. 1199 (1992)	The trial court found one aggravating circumstance and eight mitigating circumstances, but concluded that they were not sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the one aggravating circumstance, and agreed that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Cook 170 Ariz. 40, 60 821 P.2d 731, 751 (1991) (Feldman)	The trial court found three aggravating circumstances for one killing and two aggravating circumstances for the other, and found no mitigating circumstances; pursuant to its independent review of the facts, the court affirmed the finding of all of the aggravating circumstances, and found that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentences.

Table 4-17

State v. Greenway 170 Ariz. 155, 168 823 P.2d 22, 35 (1991) (Cameron)	The trial court found three aggravating circumstances and found one mitigating circumstance; pursuant to its independent review of the facts, the court affirmed the finding of all three of the aggravating circumstances, and found that the mitigating circumstance was not sufficiently substantial to call for leniency, and affirmed the sentences.
State v. Rossi 109 Ariz. Adv. Rep. 22, 23 (Apr. 2, 1992) (Moeller)	The trial court found one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the one aggravating circumstance, and found that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Atwood 110 Ariz. Adv. Rep. 3, 50 (Apr. 9, 1992) (Corcoran)	The trial court found one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the one aggravating circumstance, and found that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentence.

TABLE 5

Arizona Death Penalty Cases with Independent Weighing Conviction and Sentence Affirmed Changes in the Aggravating or Mitigating Circumstances

State v. Steelman 126 Ariz. 19, 27 612 P.2d 475, 483 (1980) (Cameron) *cert. denied* 449 U.S. 913 (1980)	The trial court found four aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; the court affirmed three and struck one of the aggravating circumstances, found that the defendant established one mitigating circumstance, and upon its weighing, held that the one mitigating circumstance was not sufficiently substantial when compared to the aggravating circumstances, and affirmed the sentence.
State v. Clark 126 Ariz. 428 616 P.2d 888 (1980) (Holohan) *cert. denied* 449 U.S. 1067 (1980)	The trial court found three aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; the court affirmed two and struck one of the aggravating circumstances, and upon its weighing, held that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentence.

State v. Greenawalt 128 Ariz. 150, 176 624 P.2d 828, 854 (1981) (Struckmeyer) *cert. denied* 454 U.S. 882 (1981)	The trial court found four aggravating circumstances and no mitigating circumstances; the court affirmed two of the aggravating circumstances but did not address the other two, held that the evidence did not support any of the claimed mitigating circumstances, and pursuant to its obligation to review the imposition of each death penalty, concluded that the punishment was neither excessive or disproportionate to the offenses committed, and affirmed the sentence.
State v. Vickers 129 Ariz. 506, 516 633 P.2d 315, 325 (1981) (Cameron)	The trial court found four aggravating circumstances and no mitigating circumstances; the court affirmed all four of the aggravating circumstances, affirmed the trial court's rejection of two mitigating circumstances, but found a mitigating circumstance that the trial court did not find, but pursuant to its independent weighing, held that the mitigating circumstance was not sufficiently substantial to call for leniency, and affirmed the sentence.

Table 5-3

State v. Tison (Ricky) 129 Ariz. 526, 545 633 P.2d 335, 354 (1981) (Struckmeyer) *cert. denied* 459 U.S. 882 (1982)	The trial court found three aggravating circumstances and three mitigating circumstances; the court affirmed two and struck one of the aggravating circumstances, and upon its weighing, held that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Tison (Raymond) 129 Ariz. 546, 556 633 P.2d 355, 365 (1981) (Struckmeyer) *cert. denied* 459 U.S. 882 (1982)	The trial court found three aggravating circumstances and three mitigating circumstances; the court affirmed two and struck one of the aggravating circumstances, and upon its weighing, held that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Schad 129 Ariz. 557, 574 633 P.2d 366, 383 (1981) (Hays) *cert. denied* 455 U.S. 983 (1982)	The trial court found two aggravating circumstances and two mitigating circumstances; the court affirmed the two aggravating circumstances, struck one of the mitigating circumstances, rejected other claimed mitigation, and upon its weighing, held that the remaining mitigating circumstance was not sufficiently substantial to call for leniency, and affirmed the sentence.

Table 5-4

State v. Ortiz 131 Ariz. 195, 211 639 P.2d 1020, 1036 (1981) (Gordon) *cert. denied* 456 U.S. 984 (1982)	The trial court found three aggravating circumstances and several possible mitigating circumstances; the court affirmed two and struck one of the aggravating circumstances, and held that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Blazak 131 Ariz. 598, 603 643 P.2d 694, 699 (1982) (Cameron) *cert. denied* 459 U.S. 882 (1982)	The trial court found five aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; the court affirmed four and struck one of the aggravating circumstances, and held that there were still enough aggravating circumstances that could not be overcome by the mitigating circumstances, and affirmed the sentence.
State v. Gretzler 135 Ariz. 42, 54 659 P.2d 1, 13 (1983) (Cameron) *cert. denied* 461 U.S. 971 (1983)	The trial court found four aggravating circumstances and one mitigating circumstance; the court affirmed all four aggravating circumstances and the one mitigating circumstance, but held that two of the aggravating circumstances were such that all of the mitigation that the defendant presented was not sufficiently substantial to overcome them, and affirmed the sentence.

Table 5-5

State v. Jeffers 135 Ariz. 404, 428 661 P.2d 1105, 1129 (1983) (Holohan) *cert. denied* 464 U.S. 865 (1983)	The trial court found two aggravating circumstances and no mitigating circumstances; the court affirmed one and struck one of the aggravating circumstances, rejected all of the defendant's proposed mitigating circumstances, and pursuant to its independent weighing, affirmed the sentence.
State v. McCall 139 Ariz. 147, 160 677 P.2d 920, 933 (1983) (Gordon) *cert. denied* 467 U.S. 1220 (1984)	The trial court found three aggravating circumstances and no mitigating circumstances; the court affirmed two and struck one of the aggravating circumstances, and pursuant to its independent weighing, held that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentence.
State v. James 141 Ariz. 141, 148 685 P.2d 1293, 1300 (1984) (Hays) *cert. denied* 469 U.S. 990 (1984)	The trial court found two aggravating circumstances and no mitigating circumstances; the court affirmed one and struck one of the aggravating circumstances, and pursuant to its independent weighing, held that there were no mitigating circumstances sufficiently substantial to call for leniency, and affirmed the sentence.

Table 5-6

State v. Smith (Roger) 141 Ariz. 510, 512 687 P.2d 1265, 1267 (1984) (Hays)	The trial court found three aggravating circumstances and no mitigating circumstances; the court affirmed two and struck one of the aggravating circumstances, and pursuant to its independent weighing, held that there were no mitigating circumstances sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Tison (Ricky) 142 Ariz. 446, 448 690 P.2d 747, 749 (1984) (Hays) *vacated* 481 U.S. 137 (1987)	Appellant incorporated all of the issues raised on the direct appeal; the court stated that it would not consider these issues again.
State v. Tison (Raymond) 142 Ariz. 454, 457 690 P.2d 755, 758 (1984) (Hays) *vacated* 481 U.S. 137 (1987)	Appellant incorporated all of the issues raised on the direct appeal; the court stated that it would not consider these issues again.
State v. Poland (Patrick) 144 Ariz. 388, 407 698 P.2d 183, 202 (1985) (Cameron) *aff'd* 476 U.S. 147 (1986)	The trial court found three aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; the court affirmed two and struck one of the aggravating circumstances, and pursuant to its independent weighing, held that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentence.

Table 5-7

State v. Poland (Michael) 144 Ariz. 412, 416 698 P.2d 207, 211 (1985) (Cameron) *aff'd* 476 U.S. 147 (1986)	The trial court found two aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; the court affirmed two and struck one of the aggravating circumstances, and pursuant to its independent weighing, held that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Bracy 145 Ariz. 520, 536 703 P.2d 464, 480 (1985) (Gordon) *cert. denied* 474 U.S. 1110 (1986)	The trial court found five aggravating circumstances and no mitigating circumstances; the court affirmed four and struck one of the aggravating circumstances, and pursuant to its independent weighing, held that there were no mitigating circumstances, and affirmed the sentence.
State v. Hooper 145 Ariz. 538, 550 703 P.2d 482, 494 (1985) (Gordon) *cert. denied* 474 U.S. 1073 (1986)	The trial court found five aggravating circumstances and no mitigating circumstances; the court affirmed four and struck one of the aggravating circumstances, and pursuant to its independent weighing, held that there were no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstances, and affirmed the sentence.

Table 5-8

State v. Smith (Bernard) 146 Ariz. 491, 501 707 P.2d 289, 299 (1985) (Feldman)	The trial court found five aggravating circumstances and no mitigating circumstances; the court affirmed three and struck two of the aggravating circumstances, and pursuant to its independent weighing, held that there were no mitigating circumstances, and affirmed the sentence.
State v. Correll 148 Ariz. 468, 483 715 P.2d 721, 736 (1986) (Cameron)	The trial court found four aggravating circumstances and no mitigating circumstances; the court affirmed three and struck one of the aggravating circumstances, and pursuant to its independent weighing, held that there were no mitigating circumstances sufficiently substantial to call for leniency, and affirmed two of the three sentences.
State v. Castaneda 150 Ariz. 382, 395 724 P.2d 1, 14 (1986) (Cameron)	The trial court found five aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; the court affirmed three and struck two of the aggravating circumstances, and pursuant to its independent weighing, held that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentence.

Table 5-9

State v. Arnett 158 Ariz. 15, 21 760 P.2d 1064, 1070 (1988) (Cameron)	The trial court found two aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; the court concluded that, because the two aggravating circumstances were based on the same prior conviction, the trial court could only count this once, but held that remand was not necessary because it concluded that there were no mitigating circumstances sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Schad 163 Ariz. 411, 421 788 P.2d 1162, 1172 (1989) (Holohan) *aff'd* 111 S. Ct. 2491 (1991)	The trial court found three aggravating circumstances and several mitigating circumstances, but concluded that they were not sufficiently substantial to call for leniency; the court concluded that, because two of the aggravating circumstances were based on the same prior conviction, the trial court could only count this once, but held that remand was not necessary because it concluded that the mitigating circumstances were not sufficiently substantial to outweigh any of the aggravating circumstances, and affirmed the sentence.

Table 5-10

State v. Robinson 165 Ariz. 51, 61 796 P.2d 853, 863 (1990) (Roll) *cert. denied* 111 S. Ct. 1025 (1991)	The trial court found three aggravating circumstances and no mitigating circumstances; the court struck one of the three aggravating circumstances, but agreed that there were no mitigating circumstances, and affirmed the sentence.
State v. Brewer 106 Ariz. Adv. Rep. 3, 10 (Jan. 28, 1992) (Corcoran)	The trial court found two aggravating circumstances and one mitigating circumstance; the court struck one of the two aggravating circumstances, but agreed that there were no mitigating circumstances sufficiently substantial to call for leniency, and affirmed the sentence.

Table 6-1

TABLE 6

ARIZONA DEATH PENALTY CASES STATING INDEPENDENT WEIGHING SENTENCE REDUCED TO LIFE NO CHANGES IN THE AGGRAVATING OR MITIGATING CIRCUMSTANCES

State v. Valencia 132 Ariz. 248, 251 645 P.2d 239, 242 (1982) (Cameron)	The trial court found two aggravating circumstances and one mitigating circumstance, but found that it was not sufficiently substantial to call for leniency; the court affirmed the two aggravating circumstances, but upon its weighing, held that the one mitigating circumstance was sufficiently substantial to call for leniency, and reduced the sentence to life, but ordered that it would be consecutive to the defendant's other sentence that he received.
State v. Stevens 158 Ariz. 595, 598 764 P.2d 724, 727 (1988) (Lacagnina)	The trial court found one aggravating circumstance and one mitigating circumstance, but found that it was not sufficiently substantial to call for leniency; the court affirmed the one aggravating circumstance, but upon its weighing, held that the one mitigating circumstance was sufficiently substantial to outweigh the aggravating circumstance, and reduced the sentence to life, and ordered that the defendant's other sentence would be consecutive to the murder sentence.

Table 6-2

State v. Mauro 159 Ariz. 186, 207 766 P.2d 59, 80 (1988) (Corcoran)	The trial court found two aggravating circumstances and one mitigating circumstance, but found that it was not sufficiently substantial to call for leniency; the court upon its weighing held that the one mitigating circumstance was sufficiently substantial to outweigh the aggravating circumstances, and reduced the sentence to life, followed by another sentence that the trial court had made consecutive to the murder sentence.
State v. Jimenez 165 Ariz. 444, 459 779 P.2d 785, 800 (1990) (Corcoran)	The trial court found two aggravating circumstances and two mitigating circumstances, but found that they were not sufficiently substantial to call for leniency; the court affirmed the one aggravating circumstance, but upon its weighing, held that the one mitigating circumstance was sufficiently substantial to outweigh the aggravating circumstances, and reduced the sentence to life, which by statute had to be consecutive to another sentence that the defendant received.

TABLE 7

Arizona Death Penalty Cases Stating Independent Weighing Sentence Reduced to Life Changes in the Aggravating or Mitigating Circumstances

State v. Doss 116 Ariz. 156, 163 568 P.2d 1054, 1061 (1977) (Holohan)	The court affirmed the finding of the one aggravating circumstance, but found a mitigating circumstance that the trial court did not find; pursuant to its independent weighing, it reduced the sentence to life.
State v. Brookover 124 Ariz. 38, 42 601 P.2d 1322, 1326 (1979) (Cameron)	The court struck one of two aggravating circumstances and found a mitigating circumstance that the trial court did not find; on its independent weighing, it reduced the sentence to life.
State v. Watson 129 Ariz. 60, 63 628 P.2d 943, 946 (1981) (Cameron) *cert. denied* 456 U.S. 981 (1982)	The court held that the trial court erred when it ruled that it could not consider in mitigation the defendant's conduct while in prison, and pursuant to its independent weighing, concluded that the mitigating circumstances presented were sufficient to overcome the aggravating circumstances, and reduced the sentence to life.
State v. Graham 135 Ariz. 209, 212 660 P.2d 460, 463 (1983) (Hays)	The court struck one of two aggravating circumstances, gave little weight to one mitigating circumstance, but found two mitigating circumstances that the trial court did not find; on its independent weighing, it reduced the sentence to life.

State v. McDaniel 136 Ariz. 188, 200 665 P.2d 70, 82 (1983) (Gordon)	The trial court found one aggravating circumstance and no mitigating circumstances; the court affirmed the one aggravating circumstance, but found a mitigating circumstance that the trial court did not find, and on its independent weighing, reduced the sentence to life, but ordered that it would be consecutive to the other sentences that the defendant had received.
State v. Johnson 147 Ariz. 395, 400 710 P.2d 1050, 1055 (1985) (Feldman)	The trial court found two aggravating circumstances and no mitigating circumstances; the court struck both of the aggravating circumstances, and remanded with directions for the trial court to impose a sentence of life consecutive to the other sentences that the defendant had received.
State v. Rockwell 161 Ariz. 5, 15 775 P.2d 1069, 1079 (1989) (Moeller)	The trial court found three aggravating circumstances and one mitigating circumstance; the court struck two of the three aggravating circumstances, and found additional mitigating circumstances that the trial court did not find, and on its independent weighing, reduced the sentence to life, and made it consecutive to other sentences that the defendant had received.

State v. Marlow 163 Ariz. 65, 72 786 P.2d 395, 402 (1989) (Foreman)	The trial court found three aggravating circumstances and no mitigating circumstances; the court struck one of the three aggravating circumstances and held that the other two could only be counted as one, and found a mitigating circumstance that the trial court did not find, and on its independent weighing, reduced the sentence to life, and noted that the trial court had already made the other sentence consecutive to the murder sentence.
State v. Fierro 166 Ariz. 539, 548 804 P.2d 72, 81 (1990) (Feldman)	The trial court found three aggravating circumstances and no mitigating circumstances; the court struck one of the three aggravating circumstances and found two mitigating circumstances; pursuant to a proportionality review, the court concluded that the killing was not above the norm of first degree murders, and reduced the sentence to life, but ordered that it be consecutive to the other sentence that the defendant received.

TABLE 8

Arizona Death Penalty Cases Stating Independent Weighing Remanded for Resentencing Changes in the Aggravating or Mitigating Circumstances

State v. Gillies 135 Ariz. 500, 511 662 P.2d 1007, 1018 (1983) (Hays)	The trial court found four aggravating circumstances and that the mitigating circumstances were not sufficiently substantial to call for leniency; the court affirmed one and struck three of the aggravating circumstances, and on its independent weighing, held that the mitigating circumstances were not sufficiently substantial to outweigh the one aggravating circumstance, and affirmed; on rehearing, it held that it would be more appropriate to remand to the trial court for resentencing.
State v. Wallace 151 Ariz. 362, 366 728 P.2d 232, 236 (1986) (Hays) *cert. denied* 483 U.S. 1011 (1987)	The trial court found two aggravating circumstances and one mitigating circumstance; the court struck one of the aggravating circumstances, and remanded for a resentencing on this one of the three sentences that the defendant received.
State v. Lopez (Samuel V.) 163 Ariz. 108 786 P.2d 959 (1990) (Moeller)	Remanded for resentencing because the trial court erred in finding one of two aggravating circumstances and the court was not able to determine what the trial court would have done.

Table 8-2

State v. Hinchey 165 Ariz. 432 799 P.2d 352 (1990) (Gordon) *cert. denied* 111 S. Ct. 1589 (1991)	Remanded for resentencing because the trial court erred in finding one of the two aggravating circumstances, and the court was not able to determine whether the trial court would have concluded that the mitigating circumstances would not have outweighed the one remaining aggravating circumstance.
State v. Schaaf 169 Ariz. 323 819 P.2d 909 (1991) (Gordon)	Remanded for resentencing because the trial court erred in finding one of the two aggravating circumstances, and the court was not able to determine whether the trial court would have concluded that the mitigating circumstances would not have outweighed the one remaining aggravating circumstance.

No. 91-7094

In The

Supreme Court of the United States

October Term, 1991

WILLIE LEE RICHMOND,

Petitioner,

v.

SAMUEL A. LEWIS, Director, Arizona Department of Corrections; and ROGER CRIST, Superintendent of the Arizona State Prison,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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STATUTES AND COURT RULES

Respondent properly concedes that the Court of Appeals erred at two key points in its analysis of this case.

First – unlike the Court of Appeals panel, which treated the *Godfrey* and *Clemons* issues as alternative grounds for its decision, *see* J.A. 128-31 – Respondent acknowledges that "if this Court finds reversible error under *either* of Richmond's arguments, the writ should issue and the case referred to the Arizona Supreme Court for further review." Resp. Br. 49 n.16 (emphasis added).

Second, Respondent confesses that the panel was incorrect in its crucial assumption that Arizona's death penalty statute does not require weighing of aggravating and mitigating circumstances. Resp. Br. 44-5.

In light of these two concessions – and the Court's recent opinions in *Stringer v. Black*, 112 S. Ct. 1130 (1992), *Sochor v. Florida*, 112 S. Ct. 2114 (1992), and *Espinosa v. Florida*, 112 S. Ct. 2926 (1992) – the conclusion would appear to be inescapable that the Court of Appeals decision must be reversed and Petitioner resentenced. In an attempt to escape that conclusion, Respondent presents a new and complex analysis of both the law and the facts of the case. Its efforts will not bear scrutiny.

I. RESPONDENT MISCHARACTERIZES THE ISSUE ARISING OUT OF THE ARIZONA SUPREME COURT'S "MINORITY"[1] OPINION WHICH DIRECTLY CONTRAVENES *GODFREY v. GEORGIA* AND *MAYNARD v. CARTWRIGHT.*

Respondent's principal tactic is to recast Petitioner's argument as one which seeks to have the Court create a new constitutional rule, so it can interpose a defense of nonretroactivity under *Teague v. Lane,* 489 U.S. 288 (1989). Resp. Br. 9-33. If it were necessary to do so, we would question the propriety of raising this issue at this late date.[2] But Respondent's argument is so transparently contrived, there is no reason to reject it on the basis of its procedural irregularity.

[1] This opinion was styled the "majority" opinion by the Arizona Supreme Court itself. Respondent more accurately calls it the "minority" opinion (but then unfairly faults the dissenting Judges in the Ninth Circuit for accepting the Arizona court's characterization). Resp. Br. 38 n.13. Rather than add to the confusion, in this Brief we will refer to the opinions by the name of their authors.

[2] No issue of retroactivity was raised at any stage of the proceedings below, including the several rounds of briefing in the Court of Appeals which postdated *Teague*. The issue was not mentioned in the Brief in Opposition, which alone should preclude its consideration here. *See Howlett v. Rose,* 496 U.S. 356, 381 (1990). Although the Court has, on occasion, considered retroactivity questions *sua sponte,* that does not mean that a party can interject it in a manner wholly inconsistent with the established rules of procedure; such an exemption from procedural regularity should extend only to jurisdictional questions, which *Teague* plainly is not. *See Collins v. Youngblood,* 497 U.S. 37, 110 S.Ct. 2715, 2718 (1990); *Williams v. Dixon,* 961 F.2d 448, 457-58 (4th Cir. 1992).

The short and complete answer to Respondent's *Teague* argument is that it is directed against a claim Petitioner has not made. Petitioner's submission is *not* "that it was error for two justices to consider . . . the aggravating circumstance of especially heinous after three justices found the circumstance did not exist." Resp. Br. 1. Petitioner's argument is rather that it was error for Justices Holohan and Hayes of the Arizona Supreme Court to rest their approval of Petitioner's death sentence on a construction and application of the "especially heinous, atrocious or cruel" aggravating circumstance that was federally unconstitutional under *Godfrey v. Georgia,* 446 U.S. 420 (1980), and *Maynard v. Cartwright,* 486 U.S. 356 (1988), *see* Pet. Br. 30-36, and that these two Justices' approval of the sentence was indispensable to its affirmance, *see* Pet. Br. 42-43. That argument is not dependent on the number of State Supreme Court Justices who disagreed with this constitutional error, but only on the fact that the error produced the votes necessary for affirmance. It is not a novel claim; it is the same claim made in *Godfrey* and *Maynard* themselves.

Respondent's arguments attempt to gloss over this by claiming that the disagreement among the Justices in the Arizona Supreme Court was simply about whether the predicates for a limiting construction of the "especially heinous" aggravating circumstance "existed factually in this case." Resp. Br. 24. The disagreement was over more than that. As Justice Cameron's opinion says, the issue was "the proper boundaries of the[ ] criteria" under which a "heinous" finding could be upheld. J.A. 93. Justice Holohan never says he finds one of the *Gretzler* criteria, as those criteria were written. That is the reason Respondent is forced to construct its elaborate framework

of implicit findings of presumably-utilized criteria. Resp. Br. 38-43. It would have been simple enough for Justice Holohan to say, "We find the defendant inflicted gratuitous violence on the victim," or "We find the defendant needlessly mutilated the victim's body," if that was what he meant. Instead, he said, "[T]he fact that the victim in the instant case was run over twice and his skull was crushed, we find to be a *ghastly* mutilation of the victim." J.A. 87 (emphasis added). Both the language[3] and the logic[4] of this statement suggest it means what Justice Cameron thought it meant: that a murder could be found to be "heinous," regardless of who directly committed it and regardless of the intent with which it was committed,

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[3] This sentence in Justice Holohan's opinion, and the preceding paragraph, is striking in its use of the passive mode, and its strict neutrality with regard to the identity of the driver at the fatal moment: "the victim . . . *was run over* not once, but twice"; "the first run *by the vehicle* was over the victim's head"; "[t]he second run *of the vehicle* was over the body"; "the fact the victim . . . *was run over* twice . . . we find to be a ghastly mutilation". J.A. 86-87 (emphasis added). This language is wholly inconsistent with Respondent's argument that these Justices independently decided for themselves that Petitioner was the driver. Resp. Br. 40. So is the Arizona Supreme Court's announced unwillingness to decide credibility questions on appeal. *See State v. Smith*, 131 Ariz. 29, 638 P.2d 686, 700 (1981).

[4] As this passage suggests, the "gruesome" aspect of Mr. Crummett's death was the fact that his "skull was crushed"; the injuries to his torso broke his ribs but hardly caused bleeding. *See* J.A. 6-7, 16. It would be difficult to characterize that injury as a "mutilation," let alone a "ghastly" one. The injury to the head was certainly "ghastly"; but it was the first injury inflicted, and caused instant death (J.A. 6), just like the ghastly gunshot wounds in *Godfrey*.

simply because "the appearance of the victim . . . was 'ghastly.' " *See* J.A. 95.

The difference between that interpretation of this aggravating factor, and the one advocated by the remaining Arizona Justices, is more than just a matter of state law. It is the difference between adhering to a limiting construction which "focuses on the state of mind of the killer," and abandoning that construction in revulsion of "the appearance of the corpse." J.A. 95. As Justice Cameron pointed out, such an abandonment of a previously adhered-to limiting construction is what occurred, and what the Court held unacceptable, in *Godfrey v. Georgia*. *See Maynard v. Cartwright*, 486 U.S. at 363. But it is also what Justice Holohan's opinion did, despite that admonition. J.A. 95.[5]

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[5] Respondent's alternative suggestion that Justice Holohan may have considered "gruesomeness" as a non-statutory aggravating circumstance (Resp. Br. 25-26) is made from whole cloth, and based on a serious misrepresentation of Arizona law.

> Under Arizona's death penalty statute, the trial court may give aggravating weight only to that evidence which tends to establish the aggravating circumstances specifically enumerated in A.R.S. § 13-703(F)
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> . . . .

State v. Atwood, 110 Ariz. Adv. Rep. 3, 1992 Westlaw 72290 (April 9, 1992). "In death penalty cases, the permissible aggravating circumstances which may be considered are set forth in A.R.S. § 13-703(F)." *State v. Beatty*, 158 Ariz. 232, 762 P.2d 519, 530 (1988). The State is "limited to the aggravating circumstances contained in" that section, *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253, 1257 (1978), and the consideration of "aggravating circumstances in addition to those in the statute [is] . . . clearly erroneous. . . . " *State v. Clark*, 126 Ariz. 428, 616 P.2d 888, 895 (1980). Respondent's contrary account is based on incomplete quota-

Certainly, that reading of Justice Holohan's opinion is easier to square with its language, and with the Law of Parsimony, than Respondent's elaborate new theory of how Petitioner could be found to have "engaged in corpse mutilation." Resp. Br. 42-43. This theory – never offered to the jury or to any court before now – picks and chooses so many diverse bits of evidence, and builds so many inferences upon inferences, we cannot believe any rational fact finder would accept it as true, beyond a reasonable doubt. Certainly, none has – including, as far as we can tell, Justices Holohan and Hayes. Justices Cameron, Gordon, and Feldman make a contrary finding, that the evidence does *not* support such a theory. J.A. 94, 96. That majority determination that the evidence fails to show intent to mutilate or inflict "gratuitous violence" would appear to be the one that should be presumed correct under 28 U.S.C. § 2254(d). *Cf. Cabana v. Bullock*, 474 U.S. 376 (1986).

Respondent asks the Court to infer otherwise – to hold that because the constitution requires adherence to a limiting construction as written, all the state judges must be conclusively presumed to have adhered to them, and

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tions, taken out of contexts which were explicitly restricted to the consideration of mitigating factors. *See Richmond v. Cardwell*, 450 F. Supp. 519, 521 (D. Ariz. 1978); *State v. Brewer*, 170 Ariz. 486, 826 P.2d 783, 801 (1992); *State v. Lavers*, 168 Ariz. 376, 814 P.2d 333, 352 (1991); *State v. Rockwell*, 161 Ariz. 5, 775 P.2d 1069, 1078 (1989); *State v. Ortiz*, 131 Ariz. 195, 639 P.2d 1020, 1033 (1981). Respondent's equation of aggravation and "rebuttal to mitigation" (Resp. Br. 26 n.8) misreads the law and makes no sense in cases such as this one, where there was no claim that the manner in which Bernard Crummett died constituted a mitigating factor.

to have made whatever fact findings would be necessary to support them. Such a notion would wish constitutional error out of existence, and contravene the many cases in which this Court has found it despite arguable ambiguities in the state court decisions.[6]

Obviously, state courts do sometimes fall into constitutional error. It is equally certain that individual state judges err, and their colleagues often register disagreement with the error. That is what happened here; nothing more or less. Justice Holohan's opinion failed to adhere to the principles of *Godfrey*, despite the efforts of the concurring and dissenting Justices to point that out. That left a constitutional flaw in this case which requires resentencing under *Clemons v. Mississippi*.

II. RESPONDENT WOULD HAVE THE COURT APPROVE APPELLATE SENTENCING DONE *SUB SILENTIO*.

Respondent's concession that Arizona's is a "weighing" capital sentencing statute (Resp. Br. 44-45) leaves it with no alternative but to argue that the concurring Justices did, in fact, conduct the kind of independent reweighing of aggravating and mitigating factors permitted by *Clemons v. Mississippi*, 494 U.S. 738 (1990). Respondent cannot deny that those Justices never said they were conducting such a reweighing in this case – or even

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[6] *E.g., Sochor v. Florida*, 112 S.Ct. at 2123; *Parker v. Dugger*, 111 S.Ct. 731, 740 (1991); *Clemons v. Mississippi*, 494 U.S. 738, 751-52 (1990); *Cabana v. Bullock*, 474 U.S. at 389; *Godfrey v. Georgia*, 446 U.S. at 432; *Eddings v. Oklahoma*, 455 U.S. 104, 119 (1982) (concurring opinion of Justice O'Connor).

suggested that they were doing so, as the Mississippi court did in *Clemons*. *See* 494 U.S. at 751. Respondent therefore argues that the concurrence either joined in the independent review done by Justice Holohan's opinion, or conducted its own reweighing *sub silentio*. Resp. Br. 47-48.

The first of these suggestions cannot be squared with the language of either opinion. Justice Holohan's opinion quite clearly stated it was engaging in "independent review" of Petitioner's sentence. J.A. 88. But that review included, on the side of aggravation, the "heinousness" factor that Justice Cameron rejected as unconstitutional. *See* J.A. 89. Indeed, that factor was one of the two points Justice Holohan "[p]articularly . . . note[d]" in the penultimate sentence in this part of his opinion, before concluding, "The death sentence is appropriate in this case." J.A. 90. Justice Cameron may have concurred in the result affirming the death sentence, but he can hardly have joined in the weighing process that led up to it, in light of his expressed disagreement with one of the two main elements it involved. By the same token, in *Clemons* and *Sochor* the appellate courts plainly agreed with the result; but because they disagreed with the factors the lower courts considered in reaching it, this Court insisted that they set forth their own reasoning before it would accept their conclusion.

Respondent's second argument has somewhat more appeal. It is true that the Arizona Supreme Court has issued many opinions which expressly include an independent sentence review, some of which were written by Justice Cameron. The record is not quite as uniform as Respondent suggests, however. Arizona appellate review

practices in capital cases have developed through the caselaw; they are not defined by statute, and their contours have not always been clear. Only a relative handful of cases have involved the precise circumstances Justice Cameron addressed here: reversal of one of several aggravating circumstances, with no change in the mitigating circumstances to be considered. *See* Resp. Appdx. Table 5. Some of these decisions clearly reweigh, omitting the invalid aggravating factors. *E.g. State v. Steelman*, 126 Ariz. 19, 612 P.2d 475, 483 (1980). Others are more oblique, and leave it unclear whether reweighing was done. *See, e.g., State v. Tison*, 129 Ariz. 526, 633 P.2d 335, 353-54 (1981); *State v. James*, 141 Ariz. 141, 685 P.2d 1293, 1300 (1984). Some appear to give weight to the trial court's decision, despite its error on the aggravation issue. *E.g., State v. Ortiz*, 131 Ariz. 195, 639 P.2d 1020, 1035 (1981). In the rare case like this one, where the Arizona Justices disagree about the proper application of an aggravating factor, the concurring opinion has been silent about its theoretical basis. *See State v. Clark*, 126 Ariz. 428, 616 P.2d 888, 893 (1980). In sum, although the caselaw supports the contention that reweighing is the Arizona Justices' general practice, that is all it supports.

Moreover, the same cases that most clearly announce independent appellate reweighing carry the negative implication that this general practice was *not* followed by the concurring opinion in this case. That many Arizona opinions are explicit about the fact and nature of their independent sentence review underscores the silence of Justice Cameron's opinion in this respect, and logically suggests that he did not conduct such a review. *Cf.* Federal Rule of Evidence 803(7).

Under *Clemons'* analysis, Justices Cameron and Gordon were acting as the functional equivalent of sentencing judges. Having announced their disagreement with the trial judge and their appellate colleagues, it may be that they undertook their own thorough, *de novo* review of the propriety of Willie Richmond's sentence, balancing anew the mitigating factors against the aggravation they found. But it is equally possible that, as Justice Feldman believed, they simply concluded the "penalty can be supported by the record" (J.A. 100) in light of the remaining aggravating factors. This Court has repeatedly held that such circumstances compel a remand for resentencing to eliminate the

> "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett*, 438 U.S., at 605 . . . *Eddings*, 455 U.S., at 119 . . . (O'Connor, J., concurring). "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Lockett*, 438 U.S., at 605 . . . .

Penry v. Lynaugh, 492 U.S. 302, 328 (1989). *See Stringer v. Black*, 112 S.Ct. 1130, 1136-37 (1992); *Parker v. Dugger*, 111 S.Ct. 731, 739-40 (1991); *Clemons v. Mississippi*, 486 U.S. at 752.

To accept Respondent's argument would be to reverse these decisions, and to call into question the vitality of the Eighth Amendment requirement that the grounds for capital sentencing decisions be spelled out sufficiently to make " 'rationally reviewable the process for imposing a sentence of death.' " *Lewis v. Jeffers*, 110 S.Ct. 3092, 3099 (1990), quoting *Godfrey v. Georgia*, 446

U.S. at 428. Before *Clemons* and since, the Court has required "that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed." *Gardner v. Florida*, 430 U.S. 349, 361 (1977) (plurality opinion). In most Arizona cases, and particularly the more recent ones, that has been done; in this earlier and procedurally unusual one, it was not. The fact it is an aberration does not make it more acceptable.

CONCLUSION

For both these reasons, and for each of them, the judgment of the Court of Appeals must be reversed.

Respectfully submitted,

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